THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1997 CUMULATIVE SUPPLEMENT

Volume 8

Chapters 41A through 52C

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of the State of North Carolina

BY

The Editorial Staff of the Publishers

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Annotated through 486 S.E.2d 626. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 8 contains the general laws of a permanent nature enacted by the General Assembly through the 1997 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

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Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1997 Regular Session affecting Chapters 41A through 52B of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 344, p. 732.
North Carolina Court of Appeals Reports through Volume 123, p. 790.
South Eastern Reporter 2nd Series through Volume 486, p. 626.
Federal Reporter 3rd Series through Volume 116, p. 875.
Federal Supplement through Volume 965, p. 1486.
Federal Rules Decisions through Volume 172, p. 600.
Bankruptcy Reports through Volume 209, p. 549.
Supreme Court Reporter through Volume 117, p. 1864.
North Carolina Law Review through Volume 75, p. 1088.
Wake Forest Law Review through Volume 32, p. 217.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

The General Statutes of North Carolina 1997 Cumulative Supplement

VOLUME 8

Chapter 41A.

State Fair Housing Act.

§ 41A-4. Unlawful discriminatory housing practices.

CASE NOTES

In order for this Act to apply, the discriminatory housing practice must first: (1) occur in a "real estate transaction", and (2) discriminate "because of" one of the reasons listed in this section. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

Defendants failed to meet the threshold question of showing that plaintiff did not allow defendants to place a mobile home on the property "because of" defendant's handicapping condition. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

§ 41A-7. Enforcement.

Legal Periodicals. — For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

Chapter 42.

Landlord and Tenant.

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ARTICLE 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter. (1981, c. 566, s. 1; 1995, c. 419, s. 1.1.)

Editor's Note. — Session Laws 1995, c. 419, s. 1.1, applicable to acts committed on or after that date, added "or Article 7".

Legal Periodicals. —

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

North Carolina law requires eviction of residential tenants to be accomplished through court action; thus, in federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed and whether termination of the lease is permissible. Charlotte Hous. Auth. v. Patterson, 120 N.C. App. 552, 464 S.E.2d 68 (1995).

§ 42-25.7. Distress and distraint not permitted.

It is the public policy of the State of North Carolina that distress and distraint are prohibited and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2. (1981, c. 566, s. 1; 1995, c. 460, s. 8.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, substituted "rights concerning" for "security interests or liens on", and "G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 44A-2(e)".

§ 42-25.9. Remedies.

(a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2 the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(c) The remedies created by this section are supplementary to all existing common-law and statutory rights and remedies.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S.42-25.9(g), 42-25.9(h), or 42-36.2, deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days.

(g) Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. If the landlord elects to sell the property at public or private sale, the landlord shall give written notice to the tenant by first-class mail to the tenant's last known address at least seven days prior to the day of the sale. The seven-day notice of sale may run concurrently with the 10-day period which allows the tenant to request possession of the property. The written notice shall state the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, storage fees, and sale costs, shall be disbursed to the tenant, upon request, within 10 days after the sale, and will thereafter be delivered to the government of the county in which the rental property is located. Upon the tenant's request prior to the day of sale, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. The landlord may apply the proceeds of the sale to the unpaid rents, damages, storage fees, and sale costs. Any surplus from the sale shall be disbursed to the tenant, upon request, within 10 days of the sale and shall thereafter be delivered to the government of the county in which the rental property is located.

(h) If the total value of all property remaining on the premises at the time of execution of a writ of possession in an action for summary ejectment is less than one hundred dollars ($100.00), then the property shall be deemed abandoned five days after the time of execution, and the landlord may throw away or dispose of the property. Upon the tenant's request prior to the expiration of the five-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. (1981, c. 566, s. 1; 1985, c. 612, ss. 1-4; 1995, c. 460, ss. 1-3.)

Effect of Amendments. — Session Laws 1995, c. 460, ss. 1, 2 and 3, effective January 1, 1996, substituted "G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 44A-2(e) or 42-25.9(d)" in subsection (b); substituted "G.S. 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 42-36.2 or G.S. 44A-2(e)" in subsection (d); and added subsections (g) and (h).

CASE NOTES

Recovery of Treble Damages and Attorney's Fees. — The prohibition against punitive or treble damages in wrongful eviction actions contained in subsection (a) does not preclude tenants from recovering treble damages under § 75-16 and attorney's fees under § 75-16.1 of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

OPINIONS OF ATTORNEY GENERAL

Summary ejectment proceedings are a landlord's exclusive remedy to regain possession of his property; the General Assembly did not intend for other statutory provisions, such as § 1-111, to apply to summary ejectment proceedings. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

The only undertaking the General Assembly intended to require of the defendants is the rent undertaking that § 42-34 provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

A summary ejectment action heard by a magistrate is an expedited judicial proceeding; under § 7A-214, the trial of a small claim summary ejectment action is set no more than 30 days after the action is commenced. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Pleadings in small claim summary ejectment actions are the same as in other small claim actions. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Safety, — N.C.A.G. — (February 10, 1995).

A defendant is not required to file any pleading at all to maintain a defense in a summary ejectment proceeding. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Defendants in summary ejectment actions are not required to post bond before pleading, pursuant to § 1-111. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-27. Local: Refusal to perform contract ground for dispossession.

When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Swain, Tyrrell, Union, Wake, Warren, Washington, Wayne, Wilson, Yadkin. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001, subsec. 4; 1907, cc. 43, 153; 1909, cc. 40, 550; C.S., s. 2366; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459; 1951, c. 279; 1953, c. 271; c. 499, s. 2; 1955, c. 93; 1961, c. 25; 1995 (Reg. Sess., 1996), c. 566, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 19, 1996, and applicable to contracts entered into on or after that date, inserted "New Hanover."

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed the jurisdictional amount established by G.S. 7A-210(1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C.S., s. 2367; 1971, c. 533, s. 4; 1973, c. 1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4; 1983, c. 332, s. 2; 1985, c. 329, s. 1; 1989, c. 311, s. 3; 1993, c. 553, s. 73(c); 1995, c. 460, s. 4.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in the first sentence substituted "seven days" for "10 days", and added "excluding weekends and legal holidays".

§ 42-29. Service of summons.

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C.S., s. 2368; 1973, c. 87; 1983, c. 332, s. 1; 1985, c. 102; 1995, c. 460, s. 5.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in the first sentence added "no later than the end of the next business day or as soon as practicable", and substituted "the defendant's" for "his", added "within five days of the issuance of the summons" in the second sentence, and in the third sentence added "or does not result in service to the defendant" and "within five days of the issuance of the summons".

§ 42-30. Judgment by confession or where plaintiff has proved case.

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-31. Trial by magistrate.

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-34. Undertaking on appeal and order staying execution.

CASE NOTES

Plaintiff was not required to comply with this section in order to perfect her appeal, because this section only provides the mechanism for an appellant to stay execution of the magistrate's judgment pending the appeal. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

OPINIONS OF ATTORNEY GENERAL

The only undertaking the General Assembly intended to require of summary ejectment defendants is the rent undertaking that this section provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-36.1A. Judgments for possession more than 30 days old.

Prior to obtaining execution of a judgment that has been entered for more than 30 days for possession of demised premises, a landlord shall sign an affidavit stating that the landlord has neither entered into a formal lease with the defendant nor accepted rental money from the defendant for any period of time after entry of the judgment. (1995, c. 460, s. 7.)

Editor's Note. — Session Laws 1995, c. 460, s. 10, made this section effective January 1, 1996.

§ 42-36.2. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property.

(a) When Sheriff May Remove Property. — Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

(1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or

(2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff May Store Property. — When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. Within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the Sheriff. — A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice. — The notice required by subsection (a) shall inform the tenant that failure to request possession of any property on the premises within 10 days of execution may result in the property being thrown away, disposed of, or sold. Notice shall be made by one of the following methods:

(1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;

(2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or

(3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ. (1983, c. 672, s. 1; 1995, c. 460, s. 6.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in subsection (a) divided the former first sentence into the present first and second sentences, deleted "to" from the end of the present first sentence, and added "The time within which the sheriff shall have to execute the writ shall" in the present second sentence; in subsection (b) added the fifth, sixth and seventh sentences, and added "If the tenant does not request release of the property within 10 days" in the eighth sentence; and added the language beginning "inform the tenant" and ending "Notice shall" in the introductory language of subsection (d).

CASE NOTES

Attempted Delivery Held Sufficient. — An attempt to deliver notice was sufficient where the evidence showed that the sheriff's department attempted to deliver notice of the writ two days prior to its execution and the party to be evicted evaded or prevented the delivery of the notice. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Conversion Not Found. — Where the evidence sufficiently demonstrated that defendant obtained plaintiff's personal property in accord with statutorily mandated procedures under § 45-21.29(1) and this section, it did not convert plaintiff's property by removing and storing it. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Article 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-37.2. Remedies.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

Article 5.

Residential Rental Agreements.

§ 42-38. Application.

CASE NOTES

Cited in Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new

requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition;

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations; and

(5) Provide operable smoke detectors, either battery- operated or electrical, having an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, that are installed in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord must replace or repair the smoke detectors provided the landlord is notified of needed replacement or repairs in writing by the tenant. Unless the landlord and the tenant have a written agreement to the contrary, the landlord must place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant must replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1; 1995, c. 111, s. 2.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to residential rental agreements in effect on or after that date, deleted "and" from the end of subdivision (a)(3); added "and" to the end of subdivision (a)(4); and added subdivision (a)(5).

Legal Periodicals. —

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

Breach of the Implied Warranty of Habitability. — Court's conclusion that the amount of rent owed by defendant abated in compensation for plaintiff's violations of housing code, pursuant to this section, mandated a further conclusion that plaintiff violated subsections (a)(1), (2), and (3) and hence breached the implied warranty of habitability. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Rent Abatement Allowed for Unfit Apartment. — Where the court should have found that plaintiff breached the implied warranty of habitability it was error to not award abatement damages to defendants for that breach. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Efforts to Repair Did Not Preclude Rent Abatement. — Where plaintiff violated this section, the trial court could not deny rent abatements for two months because of plaintiff's reasonable efforts to repair during those months. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 42-43. Tenant to maintain dwelling unit.

(a) The tenant shall:

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector provided by the landlord, or knowingly permit any person to do so;

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes;

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces; and

(7) Notify the landlord of the need for replacement of or repairs to a smoke detector. Nothing in this bill shall prohibit an individual landlord in a written agreement with the tenant from requiring the tenant to provide notice in writing of the need for replacement of or repairs to a smoke detector. Unless the landlord and the tenant have a written agreement to the contrary, the landlord must place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant must replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1; 1995, c. 111, s. 3.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to residential rental agreements in effect on or after that date, inserted "nor render inoperable the smoke detector provided by the landlord" following "premises" in subdivision (a)(4); and added subdivision (a) (7) and made related changes.

§ 42-45. Early termination of rental agreement by military personnel.

(a) Any member of the United States Armed Forces who (i) is required to move pursuant to permanent change of station orders to depart 50 miles or more from the location of the dwelling unit, or (ii) is prematurely or involuntarily discharged or released from active duty with the United States Armed Forces, may terminate his rental agreement for a dwelling unit by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the member's commanding officer.

Upon termination of a rental agreement under this section, the tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at such time as would have otherwise been required by the terms of the rental agreement. The tenant is not liable for any other rent or damages due to the early termination of the tenancy except the liquidated damages provided in subsection (b) of this section. If a member terminates the rental agreement pursuant to this section 14 or more days prior to occupancy, no damages or penalties of any kind shall be due.

(b) In consideration of early termination of the rental agreement, the tenant is liable to the landlord for liquidated damages provided the tenant has completed less than nine months of the tenancy and the landlord has suffered actual damages due to loss of the tenancy. The liquidated damages shall be in an amount no greater than one month's rent if the tenant has completed less than six months of the tenancy as of the effective date of termination, or one-half of one month's rent if the tenant has completed at least six but less than nine months of the tenancy as of the effective date of termination.

(c) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances. Nothing in this section shall affect the rights established by G.S. 42-3. (1987, c. 478, s. 1.)

Editor's Note. — This section is set out in the supplement to correct an error in the main pamphlet.

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-56. Application of Article.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§§ 42-57, 42-58: Reserved for future codification purposes.

ARTICLE 7.

Expedited Eviction of Drug Traffickers and Other Criminals.

§ 42-59. Definitions.

As used in this Article:

(1) "Complete eviction" means the eviction and removal of a tenant and all members of the tenant's household.

(2) "Criminal activity" means (i) activity that would constitute a violation of G.S. 90-95 other than a violation of G.S. 90-95(a)(3), or a conspiracy to violate any provision of G.S. 90-95 other than G.S. 90-95(a)(3); or (ii) other criminal activity that threatens the health, safety, or right of peaceful enjoyment of the entire premises by other residents or employees of the landlord.

(3) "Entire premises" or "leased residential premises" means a house, building, mobile home, or apartment, whether publicly or privately owned, which is leased for residential purposes. These terms include the entire building or complex of buildings or mobile home park and all real property of any nature appurtenant thereto and used in connection therewith, including all individual rental units, streets, sidewalks, and common areas. These terms do not include a hotel, motel, or other guest house or part thereof rented to a transient guest.

(4) "Felony" means a criminal offense that constitutes a felony under North Carolina law.

(5) "Guest" means any natural person who has been given express or implied permission by a tenant, a member of the tenant's household, or another guest of the tenant to enter an individual rental unit or any portion of the entire premises.

(6) "Individual rental unit" means an apartment or individual dwelling or accommodation which is leased to a particular tenant, whether or not it is used or occupied or intended to be used or occupied by a single family or household.

(7) "Landlord" means a person, entity, corporation, or governmental authority or agency who or which owns, operates, or manages any leased residential premises.

(8) "Partial eviction" means the eviction and removal of specified persons from a leased residential premises.

(9) "Resident" means any natural person who lawfully resides in a leased residential premises who is not a signatory to a lease or otherwise has no contractual relationship to a landlord. The term includes members of the household of a tenant.

(10) "Tenant" means any natural person or entity who is a named party or signatory to a lease or rental agreement, and who occupies, resides in, or has a legal right to possess and use an individual rental unit. (1995, c. 419, s. 1.)

Editor's Note. — Session Laws 1995, c. 419, s. 3, provides that this Article is effective October 1, 1995, and is applicable to acts committed on or after that date.

Session Laws 1995, c. 419, s. 2 contains a severability clause.

§ 42-59.1. Statement of Public Policy.

The General Assembly recognizes that the residents of this State have the right to the peaceful, safe, and quiet enjoyment of their homes. The General Assembly further recognizes that these rights, as well as the health, safety, and welfare of residents, are often jeopardized by the criminal activity of other residents of rented residential property, but that landlords are often unable to remove those residents engaged in criminal activity. In order to ensure that residents of this State can have the peaceful, safe, and quiet enjoyment of their homes, the provisions of this Article are deemed to apply to all residential rental agreements in this State. (1995, c. 419, s. 1.)

§ 42-60. Nature of actions and jurisdiction.

The causes of action established in this Article are civil actions to remove tenants or other persons from leased residential premises. These actions shall be brought in the district court of the county where the individual rental unit is located. If the plaintiff files the complaint as a small claim, the parties shall not be entitled to discovery from the magistrate. However, if such a case is filed originally in the district court or is appealed from the judgment of a magistrate for a new trial in the district court, all of the procedures and remedies in this Article shall be applicable. (1995, c. 419, s. 1.)

§ 42-61. Standard of proof.

The civil causes of action established in this Article shall be proved by a preponderance of the evidence, except as otherwise expressly provided in G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-62. Parties.

(a) Who May Bring Action. — A civil action pursuant to this Article may be brought by the landlord of a leased residential premises, or the landlord's agent, as provided for in G.S. 1-57 of the General Statutes and in Article 3 of this Chapter.

(b) Defendants to the Action. — A civil action pursuant to this Article may be brought against any person within the jurisdiction of the court, including a tenant, adult or minor member of the tenant's household, guest, or resident of the leased residential premises. If any defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him or her.

(c) Notice to Defendants. — A complaint initiating an action pursuant to this Article shall be served in the same manner as serving complaints in civil actions pursuant to G.S. 1A-1, Rule 4 and G.S. 42-29. (1995, c. 419, s. 1.)

§ 42-63. Remedies and judicial orders.

(a) Grounds for Complete Eviction. — Subject to the provisions of G.S. 42-64 and pursuant to G.S 42-68, the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit where it finds that:

(1) Criminal activity has occurred on or within the individual rental unit leased to the tenant; or

(2) The individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity; or

(3) The tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(4) The tenant has given permission to or invited a person to return or reenter any portion of the entire premises, knowing that the person has been removed and barred from the entire premises pursuant to this Article or the reasonable rules and regulations of a publicly assisted landlord; or

(5) The tenant has failed to notify law enforcement or the landlord immediately upon learning that a person who has been removed and barred from the tenant's individual rental unit pursuant to this Article has returned to or reentered the tenant's individual rental unit.

(b) Grounds for Partial Eviction and Issuance of Removal Orders. — The court shall, subject to the provisions of G.S. 42-64, order the immediate removal from the entire premises of any person other than the tenant, including an adult or minor member of the tenant's household, where the court finds that such person has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises. Persons removed pursuant to this section shall be barred from returning to or reentering any portion of the entire premises.

(c) Conditional Eviction Orders Directed Against the Tenant. — Where the court finds that a member of the tenant's household or a guest of the tenant has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises, but such person has not been named as a party defendant, has not appeared in the action or otherwise has not been subjected to the jurisdiction of the court, a conditional eviction order issued pursuant to subsection (b) of this section shall be directed against the tenant, and shall provide that as an express condition of the tenancy, the tenant shall not give permission to or invite the barred person or persons to return to or reenter any portion of the entire premises. The tenant shall acknowledge in writing that the tenant understands the terms of the court's order, and that the tenant further understands that the failure to comply with the court's order will result in the mandatory termination of the tenancy pursuant to G.S. 42-68. (1995, c. 419, s. 1.)

§ 42-64. Affirmative defense or exemption to a complete eviction.

(a) Affirmative Defense. — The court shall refrain from ordering the complete eviction of a tenant pursuant to G.S. 42-63(a) where the tenant has established that the tenant was not involved in the criminal activity and that:

(1) The tenant did not know or have reason to know that criminal activity was occurring or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(2) The tenant had done everything that could reasonably be expected under the circumstances to prevent the commission of the criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

Notwithstanding the court's denial of eviction of the tenant, if the plaintiff has proven that an evictable offense under G.S. 42-63 was committed by someone other than the tenant, the court shall order such other relief as the court deems appropriate to protect the interests of the landlord and neighbors of the tenant, including the partial eviction of the culpable household members pursuant to G.S. 42-63(b) and conditional eviction orders under G.S. 42-63(c).

(b) Subsequent Affirmative Defense to a Complete Eviction. — The affirmative defense set forth in subsection (a) of this section shall not be available to a tenant in a subsequent action brought pursuant to this Article unless the tenant can establish by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second criminal activity.

(c) Exemption. — Where the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, taking into account the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises. The burden of proof for the exemption set forth shall be by clear and convincing evidence. (1995, c. 419, s. 1.)

§ 42-65. Obstructing the execution or enforcement of a removal or eviction order.

Any person who knowingly violates any order issued pursuant to this Article or who knowingly interferes with, obstructs, impairs, or prevents any law enforcement officer from enforcing or executing any order issued pursuant to this Article, shall be subject to criminal contempt under Article 1 of Chapter 5A of the General Statutes. Nothing in this section shall be construed in any way to preclude or preempt prosecution for any other criminal offense. (1995, c. 419, s. 1.)

§ 42-66. Motion to enforce eviction and removal orders.

(a) A motion to enforce an eviction or removal order issued pursuant to G.S. 42-63(b) or (c) shall be heard on an expedited basis and within 15 days of the service of the motion.

(b) Mandatory Eviction. — The court shall order the immediate eviction of the tenant where it finds that:

(1) The tenant has given permission to or invited any person removed or barred from the leased residential premises pursuant to this Article to return to or reenter any portion of the premises; or

(2) The tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred pursuant to this Article has returned to or reentered the tenant's individual rental unit; or

(3) The tenant has otherwise knowingly violated an express term or condition of any order issued by court pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-67. Impermissible defense.

It shall not be a defense to an action brought pursuant to this Article that the criminal activity was an isolated incident or otherwise has not recurred. Nor is it a defense that the person who actually engaged in the criminal activity no longer resides in the tenant's individual rental unit. However, evidence of such facts may be admissible if offered to support affirmative defenses or grounds for an exemption pursuant to G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-68. Expedited proceedings.

Where the complaint is filed as a small claim, the expedited process for summary ejectment, as provided in Article 3 of this Chapter and Chapter 7A of the General Statutes, applies. Where the complaint is filed initially in the district court or a judgment by the magistrate is appealed to the district court, the procedure in G.S. 42-34(b) through (g), if applicable, and the following procedures apply:

(1) Expedited Hearing. — When a complaint is filed initiating an action pursuant to this Article, the court shall set the matter for a hearing which shall be held on an expedited basis and within the first term of court falling after 30 days from the service of the complaint on all defendants or from service of notice of appeal from a magistrate's judgment, unless either party obtains a continuance. However, where a defendant files a counterclaim, the court shall reset the trial for the first term of court falling after 30 days from the defendant's service of the counterclaim.

(2) Standards for Continuances. — The court shall not grant a continuance, nor shall it stay the civil proceedings pending the disposition of any related criminal proceedings, except as required to complete permitted discovery, to have the plaintiff reply to a counterclaim, or for compelling and extraordinary reasons or on application of the district attorney for good cause shown.

(3) When Presented. — The defendant in an action brought in district court pursuant to this Article shall serve an answer within 20 days after service of the summons and complaint, or within 20 days after service of the appeal to district court when the action was initially brought in small claims court. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer.

(4) Extensions of Time for Filing. — The parties to an action brought pursuant to this Article shall not be entitled to an extension of time for completing an act required by subdivision (3) of this section, except for compelling and extraordinary reasons.

(5) Default. — A party to an action brought pursuant to this Article who fails to plead in accordance with the time periods in subdivision (3) of this section shall be subject to the provisions of G.S. 1A-1, Rule 55.

(6) Rules of Civil Procedure. — Unless otherwise provided for in this Article, G.S. 1A-1, the Rules of Civil Procedure, shall apply in the district court to all actions brought pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-69. Relation to criminal proceedings.

(a) Criminal Proceedings, Conviction, or Adjudication Not Required. — The fact that a criminal prosecution involving the criminal activity is not commenced or, if commenced, has not yet been concluded or has terminated without a conviction or adjudication of delinquency shall not preclude a civil action or the issuance of any order pursuant to this Article.

(b) Effect of Conviction or Adjudication. — Where a criminal prosecution involving the criminal activity results in a final criminal conviction or adjudication of delinquency, such adjudication or conviction shall be considered in the civil action as conclusive proof that the criminal activity occurred.

(c) Admissibility of Criminal Trial Recordings or Transcripts. — Any evidence or testimony admitted in the criminal proceeding, including recordings or transcripts of the adult or juvenile criminal proceedings, whether or not they have been transcribed, may be admitted in the civil action initiated pursuant to this Article.

(d) Use of Sealed Criminal Proceeding Records. — In the event that the evidence or records of a criminal proceeding which did not result in a conviction or adjudication of delinquency have been sealed by court order, the court in a civil action brought pursuant to this Article may order such evidence or records, whether or not they have been transcribed, to be unsealed if the court finds that such evidence or records would be relevant to the fair disposition of the civil action. (1995, c. 419, s. 1.)

§ 42-70. Discovery.

(a) The parties to an action brought pursuant to this Article shall be entitled to conduct discovery, if the action is filed originally in or appealed to the district court, only in accordance with this section.

(b) Any defendant must initiate all discovery within the time allowed by this Article for the filing of an answer or counterclaim.

(c) The plaintiff must initiate all discovery within 20 days of service of an answer or counterclaim by a defendant.

(d) All parties served with interrogatories, requests for production of documents, and requests for admissions under G.S. 1A-1, Rules 33, 34, and 36 shall serve their responses within 20 days.

(e) Upon application by the plaintiff, or agreement of the parties, the court shall issue a preliminary injunction against all alleged illegal activity by the defendant or other identified parties who are residents of the individual rental unit or guests of defendants, pending the completion of discovery and any other wait before the trial has occurred. (1995, c. 419, s. 1.)

§ 42-71. Protection of threatened witnesses or affiants.

If proof necessary to establish the grounds for eviction depends, in whole or in part, upon the affidavits or testimony of witnesses who are not peace officers, the court may, upon a showing of prior threats of violence or acts of violence by any defendant or any other person, issue orders to protect those witnesses, including the nondisclosure of the name, address, or any other information which may identify those witnesses. (1995, c. 419, s. 1.)

§ 42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs.

A law enforcement agency may make available to any person or entity authorized to bring an action pursuant to this Article any police report or edited portion thereof, or forensic laboratory report or edited portion thereof, concerning criminal activity committed on or in the immediate vicinity of the leased residential premises. A law enforcement agency may also make any officer or officers available to testify as a fact witness or expert witness in a civil action brought pursuant to this Article. The agency shall not disclose such information where, in the agency's opinion, such disclosure would jeopardize an investigation, prosecution, or other proceeding, or where such disclosure would violate any federal or State statute. (1995, c. 419, s. 1.)

§ 42-73. Collection of rent.

A landlord shall be entitled to collect rent due and owing with knowledge of any illegal acts that violate the provisions of this act without such collection constituting a waiver of the alleged defaults. (1995, c. 419, s. 1.)

§ 42-74. Preliminary or emergency relief.

The district court shall have the authority at any time to issue a temporary restraining order, grant a preliminary injunction, or take such other actions as the court deems necessary to enjoin or prevent the commission of criminal activity on or in the immediate vicinity of leased residential premises, or otherwise to protect the rights and interests of all tenants and residents. A violation of any such duly issued order or preliminary relief shall subject the violator to civil or criminal contempt. (1995, c. 419, s. 1.)

§ 42-75. Cumulative remedies.

The causes of action and remedies authorized by this Article shall be cumulative with each other and shall be in addition to, not in lieu of, any other causes of action or remedies which may be available at law or equity, including causes of action and remedies based on express provisions of the lease not contrary to this Article. (1995, c. 419, s. 1.)

§ 42-76. Civil immunity.

Any person or organization who, in good faith, institutes, participates in, or encourages a person or entity to institute or participate in a civil action brought pursuant to this Article, or who in good faith provides any information relied upon by any person or entity in instituting or participating in a civil action pursuant to this Article shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such person or organization shall have the same immunity from civil liability with respect to testimony given in any judicial proceeding conducted pursuant to this Article. (1995, c. 419, s. 1.)

Chapter 43.

Land Registration.

Article 8.

Assurance Fund.

Sec.
43-51. Satisfaction by third person or by Treasurer.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 3.

Procedure for Registration.

§ 43-12. Effect of decree; approval of judge.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 4.

Registration and Effect.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 43-21. No right by adverse possession.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 8.

Assurance Fund.

§ 43-51. Satisfaction by third person or by Treasurer.

If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants; or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C.S., s. 2424; 1993, c. 257, s. 1.)

Chapter 44.

Liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

Sec.
44-49.1. [Recodified.]
44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

44-51.8. Counties to which Article applies.

Article 12.

Liens on Certain Agricultural Products.

Sec.
44-69.2. Effective period for liens on fruits and vegetables.

Article 15.

(Expires June 30, 1998) Liens For Overdue Child Support.

44-86. (Expires June 30, 1998) Lien on real and personal property of person owing past-due child support; definitions; filing required; discharge.
44-87. (Expires June 30, 1998) Discharge of lien; penalty for failure to discharge.

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

Section 44-50 must be read in conjunction with this section. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under § 44-50 is to have a lien such as is provided for in this section, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

§ 44-49.1: Recodified as § 58-3-135 by Session Laws 1995 (Regular Session, 1996), c. 674, s. 1.

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2; 1995 (Reg. Sess., 1996), c. 674, s. 3.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 674, s. 3, effective July 1, 1996, repealed the amendment to this section by Session Laws 1995, c. 538, s. 6(b), effective July 1, 1996, which would have inserted "or G.S. 44-49.1" following "G.S. 44-49", inserted "and past-due child support obligations" following "medical attention and/or hospital service", and substituted "moneys" for "damages" following "fifty percent (50%) of the amount of".

CASE NOTES

The Employee Retirement Income Security Act preempts this section, the North Carolina apportionment statute. Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4th Cir. 1992).

This section must be read in conjunction with § 44-49. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under this section is to have a lien such as is provided for in § 44-49, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

ARTICLE 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Craven, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc.

64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6; 1987, c. 466; 1995, c. 9, s. 1; 1995 (Reg. Sess., 1996), c. 676, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, inserted Swain in the list of counties.

ARTICLE 12.

Liens on Certain Agricultural Products.

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

CASE NOTES

Applied in United States v. Currituck Grain, Inc., 6 F.3d 200 (4th Cir. 1993).

§ 44-69.2. Effective period for liens on fruits and vegetables.

No security interest in or lien on fruits and vegetables sold at a regular sale at an auction market at which the Department of Agriculture and Consumer Services furnishes certified inspectors pursuant to Article 17 of Chapter 106 is effective for any purpose more than six months after the date of the sale. This section does not absolve any person from prosecution and punishment for crime. (1981, c. 640, s. 2; 1997-261, s. 109.)

Effect of Amendments. — The 1997 amendment, effective July 1, 1997, substituted "Department of Agriculture and Consumer Services" for "Department of Agriculture".

ARTICLE 15.

(Expires June 30, 1998) Liens For Overdue Child Support.

§ 44-86. (Expires June 30, 1998) Lien on real and personal property of person owing past-due child support; definitions; filing required; discharge.

(a) Definitions. — As used in this Article, the terms "designated representative", "obligee", and "obligor" have the meanings given them in G.S. 110-129.

(b) Lien Created. — There is created a general lien upon the real and personal property of any person who is delinquent in the payment of court-ordered child support. For purposes of this section, an obligor is delinquent when arrears under a court-ordered child support obligation equals three months of payments or three thou-

§ 44-86 has a delayed expiration date. See notes.

sand dollars ($3,000), whichever occurs first. The amount of the lien shall be determined by a verified statement of child support delinquency prepared in accordance with subsection (c) of this section.

(c) Contents of Statement; Verification. — A verified statement of child support delinquency shall contain the following information:

(1) The caption and file docket number of the case in which child support was ordered;
(2) The date of the order of support;
(3) The amount of the child support obligation established by the order; and
(4) The amount of the arrearage as of the date of the statement.

The statement shall be verified by the designated representative in a IV-D case and by the obligee in a non-IV-D case.

(d) Filing and Perfection of Lien. — The verified statement shall be filed in the office of the clerk of superior court in the county in which the child support was ordered. At the time of filing the verified statement, the designated representative in a IV-D case and the obligee in a non-IV-D case shall serve notice on the obligor that the statement has been filed. The notice shall be served and the return of service filed with the clerk of court in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The notice shall specify the manners in which the lien may be discharged. Upon perfection of the lien, as set forth herein, the clerk shall docket and index the statement on the judgment docket. The clerk shall issue a transcript of the docketed statement to the clerk of any other county as requested by the designated representative in a IV-D case or the obligee in a non-IV-D case. The clerk receiving the transcript shall docket and index the transcript. A lien on personal property attaches when the property is seized by the sheriff. A lien on real property attaches when the perfected lien is docketed and indexed on the judgment docket.

(1) IV-D Cases. — In IV-D cases, the filing of a verified statement with the clerk of court by the designated representative shall perfect the lien. The obligor may contest the lien by motion in the cause.

(2) Non-IV-D Cases. — In a non-IV-D case, the notice to the obligor of the filing of the verified statement shall state that the obligor has 30 days from the date of service to request a hearing before a district court judge to contest the validity of the lien. If the obligor fails to contest the lien after 30 days from the time of service, the obligee may make application to the clerk, and the clerk shall record and index the lien on the judgment docket. If the obligee files a petition contesting the validity of the lien, a hearing shall be held before a district court judge to determine whether the lien is valid and proper. In contested cases, the clerk of court shall record and index the lien on the judgment docket only by order of the judge. The docketing of a verified statement in a non-IV-D case shall perfect the lien when duly recorded and indexed.

(e) Lien Superior to Subsequent Liens. — Except as otherwise provided by law, a lien established in accordance with this section shall take priority over all other liens subsequently acquired and shall continue from the date of filing until discharged in accordance with G.S. 44-87.

(f) Execution on the Lien. — A designated representative in a IV-D case, after 30 days from the docketing of the perfected lien, or an obligee in a non-IV-D case, after docketing the perfected lien, may enforce the lien in the same manner as for a civil judgment.

(g) Liens Arising Out-of-State. — This State shall accord full faith and credit to child support liens arising in another state when the child support enforcement agency, party, or other entity seeking to enforce the lien complies with the requirements relating to recording and serving child support liens as set forth in this Article and with the requirements relating to the enforcement of foreign judgments as set forth in Chapter 1C of the General Statutes. (1997-433, s. 7.)

Editor's Note. — Session Laws 1997-433, s. 11.3, made this Article effective October 1, 1997.

Session Laws 1997-433, s. 11.3, provides that this Article expires on June 30, 1998.

§ 44-87. (Expires June 30, 1998) Discharge of lien; penalty for failure to discharge.

(a) Liens created by this Article may be discharged as follows:

(1) By the designated representative in IV-D cases, or by the obligee in non-IV-D cases, filing with the clerk of superior court an acknowledgment that the obligor has satisfied the full amount of the lien;

(2) By depositing with the clerk of superior court money equal to the amount of the claim and filing a petition in the cause requesting a district court judge to determine the validity of the lien. The money shall not be disbursed except by order of a district court judge following the hearing on the merits; or

(3) By an entry in the judgment docket book that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action.

(b) An obligee in a non-IV-D case who has received payment in full for a delinquent child support obligation which is the basis for the lien shall, within 30 days of receipt of payment, file with the clerk of court an acknowledgment that the obligor has satisfied the full amount of the lien and that the lien is discharged. If the lienholder fails to timely file the acknowledgment, the obligor may, after serving notice on the obligee, file an action in district court to discharge the lien. If in an action filed by the obligor to discharge the lien, the court discharges the lien and finds that the obligee failed to timely file an acknowledgment discharging the lien, then the court may allow the prevailing party to recover reasonable attorneys' fees to be taxed as court costs against the obligee. (1997-433, s. 7.)

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

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Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

44A-7. Definitions.
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Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

44A-18. Grant of lien; subrogation; perfection.
44A-23. Contractor's lien; perfection of subrogation rights of subcontractor.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-2. Persons entitled to lien on personal property.

(a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or
(2) The contract price; or
(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests.

(e) Any lessor of nonresidential demised premises has a lien on all furniture, furnishings, trade fixtures, equipment and other personal property to which the tenant has legal title and which remains on the demised premises if (i) the tenant has vacated the premises for 21 or more days after the paid rental period has expired, and (ii) the lessor has a lawful claim for damages against the tenant. If the tenant has vacated the premises for 21 or more days after the expiration of the paid rental period, or if the lessor has received a judgment for possession of the premises which is executable and the tenant has vacated the premises, then all property remaining on the premises may be removed and placed in storage. If the total value of all property remaining on the premises is less than one hundred dollars ($100.00), then it shall be deemed abandoned five days after the tenant has vacated the premises, and the lessor may remove it and may donate it to any charitable institution or organization. Provided, the lessor shall not have a lien if there is an agreement between the lessor or his agent and the tenant that the lessor shall not have a lien. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at public sale pursuant to the provisions of G.S. 44A-4(e). This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien.

(e1) This Article shall not apply to liens created by storage of personal property at a self-service storage facility.

(f) Any person who improves any textile goods in the ordinary course of his business pursuant to an express or implied contract with the owner or legal possessor of such goods shall have a lien upon all goods of such owner or possessor in his possession for improvement. The amount of such lien shall be for the entire unpaid contracted charges owed such person for improvement of said goods including any amount owed for improvement of goods, the possession of which may have been relinquished, and such lien shall have priority over perfected and unperfected security interests. "Goods" as used herein includes any textile goods, yarns or products of natural or man-made fibers or combination thereof. "Improve" as used herein shall be construed to include processing, fabricating or treating by throwing, spinning, knitting, dyeing, finishing, fabricating or otherwise.

(g) Any person who fabricates, casts, or otherwise makes a mold or who uses a mold to manufacture, assemble, or otherwise make a product pursuant to an express or implied contract with the owner of such mold shall have a lien upon the mold. For a lien to arise under this subsection, there must exist written evidence that the parties understood that a lien could be applied against the mold, with the evidence being in the form either of a written contract or a separate written statement provided by the potential holder of the lien under this subsection to the owner of the mold prior to the fabrication or use of the mold. The written contract or separate written statement must describe generally the amount of the potential lien as set forth in this subsection. The amount of the lien under this subsection shall equal the total of (i) any unpaid contracted charges due from the owner of the mold for making the mold, plus (ii) any unpaid contracted charges for all products made with the mold. The lien under this subsection shall not have priority over any security interest in the mold which is perfected at the time the person acquires this lien. As used in this subsection, the word "mold" shall include a mold, die, form, or pattern. (1967, c. 1029, s. 1; 1971, cc. 261, 403; c. 544, s. 1; c. 1197; 1973, c. 1298, s. 1; 1975, c. 461; 1981, c. 566, s. 2; c. 682, s. 9; 1981 (Reg. Sess., 1982), c. 1275, s. 2; 1995, c. 460, s. 9; c. 480, s. 1; 1995 (Reg. Sess., 1996), c. 744, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to charges incurred on or after that date, added subsection (g).

CASE NOTES

Warehouseman's Lien. — Any rights a warehouseman had to plaintiff's personal property stored in his warehouse were to be analyzed as a warehouseman's lien under chapter 25 rather than as a possessory lien under chapter 44A. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Applied in Marlen C. Robb & Son Boatyard & Marina, Inc. v. Vessel Bristol, 893 F. Supp. 526 (E.D.N.C. 1994).

Stated in In re Aerospace Technologies, Inc., 199 Bankr. 331 (Bankr. M.D.N.C. 1996).

§ 44A-4. Enforcement of lien by sale.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days or, in the case of towing and storage charges on a motor vehicle, 10 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the relevant time period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of ten dollars ($10.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, within 15 days of receipt of notice from the lienor, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party and other person claiming an interest in the property who is actually known to the Division or who can be reasonably ascertained. The notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired and the Division shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. Failure of the recipient to notify the Division within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, the Division shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as

provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the Division notifies the lienor that the registered or certified mail notice has been returned as undeliverable, or if the Division cannot ascertain the name of the person having legal title to the vehicle and the fair market value of the vehicle is less than eight hundred dollars ($800.00), the lienor may institute a special proceeding in the county where the vehicle is being held, for authorization to sell that vehicle. Market value shall be determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall escheat to the State and be paid immediately to the treasurer for disposition pursuant to Chapter 116B of the General Statutes. A vehicle owner or possessor claiming an interest in such proceeds shall have a right of action under G.S. 116B-38.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person to whom the Division has mailed notice pursuant to this subsection. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that the lienor has complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-399.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in

satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private Sale. — Sale by private sale may be made in any manner that is commercially reasonable. If the property upon which the lien is claimed is a motor vehicle, the sale may not be made until notice is given to the Commissioner of Motor Vehicles pursuant to G.S. 20-114(c). Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for Public Sale. — If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:
   a. Shall notify the Commissioner of Motor Vehicles as provided in G.S. 20-114(c) if the property upon which the lien is claimed is a motor vehicle; and
   a1. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the

lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held;

and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale. The notice of sale need not be published if the vehicle has a market value of less than three thousand five hundred dollars ($3,500), as determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;

(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;

(3) A description of the property;

(4) The amount due for which the lien is claimed;

(5) The place of the sale;

(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for Noncompliance. — If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26; 1983, c. 44, ss. 1, 2; 1985, c. 655, ss. 4, 5; 1989, c. 770, s. 10; 1991, c. 344, s. 1; c. 731, s. 3; 1995 (Reg. Sess., 1996), c. 635, ss. 2 to 4.)

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 635, ss. 2, 3 and 4, effective October 1, 1996, inserted "or, in the case of towing and storage charges on a motor vehicle, 10 days" following "30 days" in the first sentence of subsection (a); in subdivision (b)(1), in the first paragraph, substituted "relevant time" for "30 days" in the first sentence, and inserted "within 15 days of receipt of notice from the lienor" in the second sentence, in the second paragraph, inserted "or if the Division cannot ascertain the name of the person having legal title to the vehicle and the fair market value of the vehicle is less than eight hundred dollars ($800.00)" in the first sentence, and added the second sentence, and, in the fourth paragraph, substituted "the lienor has complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale" for "two or more bona fide bids on the vehicle were received, the names, addresses and bids of the bidders"; and added the second sentence of subdivision (e)(1).

CASE NOTES

Attorney Fees. — Where defendant neither prevailed nor defended under the theory that he had a chapter 44A lien, but it was a warehouseman's lien under chapter 25, the trial court erred by awarding attorney fees under this section. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon. (1969, c. 1112, s. 1; 1975, c. 715, s. 1; 1985, c. 689, s. 13; 1995 (Reg. Sess., 1996), c. 607, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to lien rights that arise on or after that date, inserted "and rental of equipment directly utilized on the real property in making the improvement" following "General Statutes" in subdivision (1).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to such contract. (1969, c. 1112, s. 1; 1975, c. 715, s. 2; 1995 (Reg. Sess., 1996), c. 607, s. 2.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to lien rights that arise on or after that date, inserted "or furnishes rental equipment" following "furnishes materials", and inserted "or equipment rented" following "material furnished".

CASE NOTES

There must be a contract, etc. — Defendant was not a materialman for purposes of the statute of repose, § 1-50(5)(b)(9), because plaintiff and defendant had no contract, and defendant's only intent was that of a manufacturer, to place its product into the stream of commerce, without ever intending its product be particularly delivered to plaintiff. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 122 N.C. App. 413, 470 S.E.2d 826 (1996).

§ 44A-12. Filing claim of lien.

CASE NOTES

Cited in Vance Constr. Co. v. Eaton Ferry Marina, Inc., 120 N.C. App. 401, 462 S.E.2d 814 (1995); Johnson Neurological Clinic, Inc. v. Kirkman, 121 N.C. App. 326, 465 S.E.2d 32 (1996); Paving Equip. of Carolinas, Inc. v. Waters, 122 N.C. App. 502, 470 S.E.2d 546 (1996).

§ 44A-13. Action to enforce lien.

CASE NOTES

Editor's Note. — *RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983) reversed RDC, Inc. v. Brookleigh Bldrs., Inc., 60 N.C. App. 375, 299 S.E.2d 448 (1983), annotated under this section in the main volume. The annotations to this case which are in the main volume should be disregarded.*

The amount of the lien is limited, etc. —

A judgment enforcing a lien under subsection (b) cannot exceed the amount determined to be due from the defendant to the plaintiff; thus, portion of judgment ordering attorney's fees awarded by jury to be enforced as a part of the lien was a nullity. Paving Equip. of Carolinas, Inc. v. Waters, 122 N.C. App. 502, 470 S.E.2d 546 (1996).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien; subrogation; perfection.

Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the first tier subcontractor with whom the second tier subcontractor dealt and which arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he dealt provided for in subdivision (1) and shall be entitled to perfect it by notice to the extent of his claim.

(3) A third tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the second tier subcontractor with whom the third tier subcontractor dealt and which arise out of the improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the second tier subcontractor with whom he dealt and to the lien of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice to the extent of his claim.

(4) Subcontractors more remote than the third tier who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds which are owed to the person with whom they dealt and which arise out of the improvement on which they furnished labor, materials, or rental equipment, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens granted under this section shall secure amounts earned by the lien claimant as a result of his having furnished labor, materials, or rental equipment at the site of the improvement under the contract to improve real property, whether or not such amounts are due and whether or not performance or delivery is complete.

(6) A lien upon funds granted under this section is perfected upon the giving of notice in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the

obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the lien of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23. (1971, c. 880, s. 1; 1985, c. 702, s. 3; 1995 (Reg. Sess., 1996), c. 607, s. 3.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to lien rights that arise on or after that date, substituted "labor, materials, or rental equipment" for "labor or materials" throughout the section.

CASE NOTES

Notice to Be Filed Following Receipt of Payment. — Subcontractor who receives payments from a contractor within 90 days of the contractor's filing for bankruptcy does not perfect his lien by the mere receipt and possession of the payments; he must still file the statutory notice in order to become a secured creditor and protect his receipt of payments from avoidance by the bankruptcy trustee. Precision Walls, Inc. v. Crampton, 196 Bankr. 299 (E.D.N.C. 1996).

Cited in Precision Walls, Inc. v. Crampton, 196 Bankr. 299 (E.D.N.C. 1996).

§ 44A-22. Priority of liens.

CASE NOTES

Notice Must Be Filed. — Subcontractor who receives payments from a contractor within 90 days of the contractor's filing for bankruptcy does not perfect his lien by the mere receipt and possession of the payments; he must still file the statutory notice, in order to become a secured creditor and protect his receipt of payments from avoidance by the bankruptcy trustee. Precision Walls, Inc. v. Crampton, 196 Bankr. 299 (E.D.N.C. 1996).

§ 44A-23. Contractor's lien; perfection of subrogation rights of subcontractor.

(a) First tier subcontractor. — A first tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. —

(1) A second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of the Chapter except when:

a. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the Clerk of Superior Court in each county wherein the real property to be improved is located, a completed and signed Notice of Contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed Notice of Subcontract form by the same means of service as described in G.S. 44A-19(d); or

b. After the posting and filing of a signed Notice of Contract and the service of a signed Notice of Subcontract, the contractor serves upon the second or third tier subcontractor, within five days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the Notice of Subcontract form set forth herein.

(2) The form of the Notice of Contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the Clerk of Superior Court shall be the same as charged for filing a Claim of Lien:

"NOTICE OF CONTRACT

"(1) Name and address of the Contractor:

"(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:

"(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):

"(4) Name and address of the person, firm or corporation filing this Notice of Contract:

"Dated: ____________________

____
"Contractor

"Filed this the ______ day of __________, 19____.

____
Clerk of Superior Court"

(3) The form of the Notice of Subcontract to be so utilized under this section shall be substantially as follows:

"NOTICE OF SUBCONTRACT

"(1) Name and address of the subcontractor:

"(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

"(3)

"(i) General description of the subcontractor's contract, including the names of the parties thereto:

"(ii) General description of the labor and material performed and furnished thereunder:

"(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within five days following, each subsequent payment by the contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.

"Dated: ____________

____
Subcontractor"

(4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a Claim of Lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent. (1971, c. 880, s. 1; 1985, c. 702, s. 4; 1991 (Reg. Sess., 1992), c. 1010, s. 1; 1993, c. 553, s. 13; 1997-456, s. 27.)

Editor's Note. — Subdivisions (b)(1)(i) and (b)(1)(ii) were redesignated as (b)(1)a. and (b)(1)b. pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Legal Periodicals. — For survey on subcontractors' statutory lien rights, see 70 N.C.L. Rev. 1996 (1992).

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-35. Attorneys' fees.

CASE NOTES

Cited in Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996).

Chapter 45.
Mortgages and Deeds of Trust.

ARTICLE 2A.
Sales under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

CASE NOTES

Valid Debt Not Shown. — Where defendants executed a promissory note and deed of trust with the understanding that photo processing equipment would be assigned to them, but authorization for the assignment was never obtained, and the defendants did not have possession of the equipment there was a failure of consideration and no valid debt was created between the parties. In re Land Covered By Certain Deed of Trust, 123 N.C. App. 133, 472 S.E.2d 369 (1996).

Quoted in In re Deed of Trust Executed by C & M Invs. of High Point, Inc., 123 N.C. App. 52, 472 S.E.2d 341 (1996).

§ 45-21.21. Postponement of sale.

CASE NOTES

Cited in C.C. Mangum, Inc. v. Brown, 124 N.C. App. 658, 478 S.E.2d 245 (1996).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

CASE NOTES

Applied in In re C & M Invs., 346 N.C. 127, 484 S.E.2d 546 (1997).

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Sec.
46-3. Petition by cotenant or personal representative of cotenant.
46-10. Commissioners to meet and make partition; equalizing shares.

Article 2.

Partition Sales of Real Property.

Sec.
46-22. Sale in lieu of partition.
46-25. Sale of standing timber on partition; valuation of life estate.
46-28. Sale procedure.
46-28.1. Petition for revocation of confirmation order.
46-28.2. When bidder may purchase.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in an action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Superior court had no authority to partition marital property pursuant to the provisions of this section where the jurisdiction of the district court had been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Dismissal of Appeal Held Error. — Where petitioners excepted to the commissioners' report under § 46-19, the trial court did not have the authority to dismiss the appeal due to petitioners failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

Cited in McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993).

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

CASE NOTES

I. In General.

I. IN GENERAL.

Jurisdiction of Superior Court. — Where petitioner tried but failed to invoke the jurisdiction of the district court for equitable distribution of the parties' marital property the superior court had subject matter jurisdiction to hear the proceeding for the partition of the subject property. Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873, cert. denied, 338 N.C. 515, 452 S.E.2d 809 (1994).

Cited in Beck v. Beck, 125 N.C. App. 402, 481 S.E.2d 317 (1997); Whatley v. Whatley, — N.C. App. —, 484 S.E.2d 420 (1997).

§ 46-7. Commissioners appointed.

CASE NOTES

Assignment by Coin Flip. — Where commissioners properly divided property into two sections that were nearly equal, assigning the property by flipping a coin was not improper. Robertson v. Robertson, — N.C. App. —, 484 S.E.2d 831 (1997).

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-10. Commissioners to meet and make partition; equalizing shares.

The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C.S., s. 3222; 1995, c. 379, s. 14(b).)

CASE NOTES

Assignment by Coin Flip. — Where commissioners properly divided property into two sections that were nearly equal, assigning the property by flipping a coin was not improper. Robertson v. Robertson, — N.C. App. —, 484 S.E.2d 831 (1997).

Separately Owned Property. — When partitioning property, such factors as separately owned property may in the discretion of the commissioners be considered; however, such consideration is not required. Robertson v. Robertson, — N.C. App. —, 484 S.E.2d 831 (1997).

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

Petitioners Not Required to State Specific Grounds. — Where petitioners excepted to the commissioners' report under this section, the trial court did not have the authority to dismiss the appeal due to petitioners' failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The party seeking a partition by sale must show substantial injustice or material impairment of his rights or position such that the value of his share of the real property would be materially less on actual partition than if the land were sold and the tenants were paid according to their respective shares. Whatley v. Whatley, — N.C. App. —, 484 S.E.2d 420 (1997).

Failure of Court to Make Required Findings. — Where the trial court failed to make the findings of fact required by this section for partition by sale, that actual partition would result in one cotenant's share having less value than the share he would receive were the property partitioned by sale, and that actual partition would materially impair a cotenant's rights, since there was also no evidence in the record which would support such findings, the trial court's order of partition by sale was reversed. Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993).

Cited in Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-25. Sale of standing timber on partition; valuation of life estate.

When two or more persons own, as tenants in common, joint tenants or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his or her portion of the net proceeds of sales, to be ascertained under the mortality tables established by law: Provided further, that prior to a judgment allowing a life tenant to sell the timber there must be a finding that the cutting is in keeping with good husbandry and that no substantial injury will be done to the remainder interest. (1895, c. 187; Rev., s. 2510; C.S., s. 3236; 1949, c. 34; 1975, c. 476, s. 1; 1997-133, s. 3.)

Effect of Amendments. — The 1997 amendment, effective June 4, 1997, substituted "his or her portion" for "his portion", and "mortality tables" for "mortuary tables" in the first proviso.

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7.)

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

(2) In the case of any party to the partition proceeding:

a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or

b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or

c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and

(2) The purchaser has not agreed in writing to assume the lien; and

(3) The lien will not be satisfied out of the proceeds of the sale; and

(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale pursuant to the provisions of G.S. 1-339.27. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7.)

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.

47-3. [Repealed.]

47-7, 47-8. [Repealed.]

47-8.1. Certain documents verified by attorneys validated.

47-15. [Repealed.]

Article 2.

Registration.

47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.

47-18.1. Registration of certificate of corporate merger or consolidation.

47-18.2. Registration of Inheritance and Estate Tax Waiver.

47-18.3. Execution of corporate instruments; authority and proof.

47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

47-20.5. Real property; effectiveness of after-acquired property clause.

47-29.1. Recordation of waste disposal on land.

47-30. Plats and subdivisions; mapping requirements.

47-30.2. Review Officer.

47-31. Certified copies may be registered; used as evidence.

47-32. Photographic copies of plats, etc.

47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

47-36.1. Correction of errors in recorded instruments.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

47-41. [Repealed.]

47-41.01. Corporate conveyances.

47-41.02. Other forms of probate for corporate conveyances.

47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

Sec.

47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.

47-46.3. Affidavit of lost note.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

47-50. Order of registration omitted.

47-51. Official deeds omitting seals.

47-53. Probates omitting official seals, etc.

47-53.1. Acknowledgment omitting seal of notary public.

47-54.1. Registration by register's assistants or deputies.

47-71.1. Corporate seal omitted prior to January 1, 1991.

47-100. Acknowledgments taken by officer who was grantor.

47-108.5. Validation of certain deeds executed in other states where seal omitted.

47-108.11. Validation of recorded instruments where seals have been omitted.

47-108.20. Validation of certain recorded instruments that were not acknowledged.

47-108.21. Sales for 1930 on dates other than first Monday in June validated.

47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

47-108.23. Tax sales for 1933-34 and certificates validated.

47-108.24. Notices of sale for taxes by publication validated.

47-108.25. Validation of sales and resales held pursuant to § 105-374.

47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

47-112. Forgery or alteration of discharge or certificate; punishment.

Article 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

Sec.
47-115.1. [Repealed.]

ARTICLE 1.

Probate.

§ 47-3: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-7: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-8: Repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-8.1. Certain documents verified by attorneys validated.

Final judgments otherwise proper, entered in actions or proceedings in which the complaints or any other documents were verified in violation of G.S. 47-8 prior to its repeal shall not be void or voidable. (1991, c. 543, s. 2.)

Editor's Note. — Session Laws 1991, c. 543, s. 4 made this section effective upon ratification. This section was ratified July 4, 1991.

Section 47-8 referred to in this section, was repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-14.1. Repeal of laws requiring private examination of married women.

CASE NOTES

Cited in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Local Modification. — (As to Article 2) Mitchell: 1987, c. 537.

§ 47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.

It shall not be necessary in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, to record a written assignment in the office of the register of deeds in the county in which the real property is located. A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. The provisions of this section do not preclude the recordation of a written assignment of a deed of trust, mortgage, or other security instrument, with or without the promissory note or other instrument that it secures, provided that the assignment complies with applicable law. (1993, c. 288, s. 4.)

Editor's Note. — Session Laws 1993, c. 288, s. 4, made this section effective upon ratification. The act was ratified July 6, 1993, and applies to assignments made on or after that date.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

Legal Periodicals. —

For article, "Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases," see 14 Campbell L. Rev. 275 (1993).

For essay, "Russell v. Hill (N.C. 1899) Misunderstood Lessons," see 73 N.C.L. Rev. 2031 (1995).

CASE NOTES

I. In General.
III. What Instruments Affected.
IV. Persons Protected and Rights Thereof.
V. Notice.

I. IN GENERAL.

This section and § 47-20, etc. — The recording statute for deeds of trust, § 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

This section and § 47-20 are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Transformation into Pure Race State. — The Connor Act of 1885, currently codified as this section, transformed North Carolina into a "pure race" state for the recording of deeds, contracts to convey, and other instruments affecting interests in land; under its terms, no such instrument is effective as against either lien creditors, or purchasers for value, until the time of its registration. Love v. United States, 889 F. Supp. 1548 (E.D.N.C. 1994).

The purpose of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Title Examiner Must Read Prior Conveyances. — In title examination when checking the grantor's out conveyances, it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Principles applicable to sufficiency of references, etc. — In accord with the main volume. See Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Rents Already Accrued and Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Applied in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 79 N.C. App. 187, 339 S.E.2d 26 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990); In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990); National Adv. Co. v. North Carolina DOT, 124 N.C. App. 620, 478 S.E.2d 248 (1996).

III. WHAT INSTRUMENTS AFFECTED.

Parol and Implied Trusts, etc. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

IV. PERSONS PROTECTED AND RIGHTS THEREOF.

State's Title Superior Where Intervenor's Interest Derived from Deed Recorded After Filing of Lis Pendens. — Since the State's title to property derived from a Racketeer Influenced and Corrupt Organizations Act forfeiture proceeding related back to the date of the institution of the action when the notice of lis pendens was filed pursuant to § 75D-5, the State's title was superior to the interest of an intervenor which derived from a deed from her husband recorded after the institution of the RICO action, and after the filing of the notice of lis pendens. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Creditors Put Upon Same Plane as Purchasers. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

V. NOTICE.

A purchaser has constructive notice of all duly recorded documents that a proper examination of the title should reveal. Stegall v. Robinson, 81 N.C. App 617, 344 S.E.2d 803 (1986).

Actual Knowledge Not Sufficient Notice of Restrictive Covenant. — It is well settled in the state that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title. Unlike in many states, actual knowledge, no matter how full and formal, is not sufficient to bind a purchaser in the state with notice of the existence of a restrictive covenant. Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 177 (1992).

Notice of Restrictive Covenants Recorded with First Conveyance of Subdivision Lots. — Defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat, but were recorded with the first conveyance out of lots in the subdivision. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

§ 47-18.1. Registration of certificate of corporate merger or consolidation.

(a) If title to real property in this State is transferred by operation of law upon the merger or consolidation of two or more corporations, such transfer is effective against lien creditors or purchasers for a valuable consideration from the corporation formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger or consolidation, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification. If the corporation involved is not a domestic corporation, a similar certificate by any competent authority in the jurisdiction of incorporation may be registered in accordance with this section.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the corporation formerly owning the property shall appear in the "Grantor" index, and the name of the corporation owning the property by virtue of the merger or consolidation shall appear in the "Grantee" index. (1967, c. 950, s. 3; 1991, c. 645, s. 2(b).)

§ 47-18.2. Registration of Inheritance and Estate Tax Waiver.

An Inheritance and Estate Tax Waiver or other consent to transfer issued by the Secretary of Revenue bearing the signature of the Secretary of Revenue or the official facsimile signature of the Secretary of Revenue may be registered by the Register of Deeds in the county or counties where the real estate described in the Inheritance and Estate Tax Waiver or consent to transfer is located in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by an officer shall be required. The name of the decedent owning the real property at death shall appear in the "Grantor" index. Nothing herein shall require a personal representative or other person interested in the decedent's estate to register Inheritance and Estate Tax Waivers or consents to transfer. (1987, c. 548, s. 3.)

Editor's Note. — Session Laws 1987, c. 548, s. 4 made this section effective upon ratification. The act was ratified July 3, 1987.

§ 47-18.3. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the bylaws or articles of incorporation, when it appears on the face of an instrument registered in the office of the register of deeds that the instrument was signed in the ordinary course of business on behalf of a domestic or foreign corporation by its chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, and attested or countersigned by another person who is its secretary or an assistant secretary, (or, in the case of a bank, its secretary, assistant secretary, cashier, or assistant cashier), such an instrument shall be as valid with respect to the rights of innocent third parties as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The subsection shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation.

(b) Any instrument registered in the office of the register of deeds, appearing on its face to be executed by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, is prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that the instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, and that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(c) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, inherent or apparent authority, ratification, estoppel, or otherwise.

(d) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(e) The Home Owners Loan Corporation or any corporation, the majority of whose stock is owned by the United States government, may convey lands or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution, under seal, of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1991, c. 647, s. 2.)

Editor's Note. — Session Laws 1991, c. 647, which enacted this section, in section 7 provides: "Sections 1 and 2 of this act are effective July 1, 1990, but shall not apply in any action or proceeding filed on or after July 1, 1990, and before the ratification of this act." The act was ratified on July 12, 1991.

§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section.

(b) For purposes of this section and G.S. 47-20.1, the following definitions apply:

(1) "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-109(3), timber, the proceeds from the sale of farm products or timber, or the proceeds from the recovery or

severance of any mineral deposits located on or under real property.

(2) "Assignment of leases, rents, issues, or profits" means every document assigning, transferring, pledging, mortgaging, or conveying an interest in leases, licenses to real property, and rents, issues, or profits arising from real property, whether set forth in a separate instrument or contained in a mortgage, deed of trust, conditional sales contract, or other deed or instrument of conveyance.

(3) "Collateral assignment" means any assignment of leases, rents, issues, or profits made and delivered in connection with the grant of any mortgage, or the execution of any conditional sales contract or deed of trust or in connection with any extension of credit made against the security of any interest in real property, where the assignor retains the right to collect or to apply such lease revenues, rents, issues, or profits after assignment and prior to default.

(c) The recording of a written document in accordance with G.S. 47-20.1 containing an assignment of leases, rents, issues, or profits arising from real property shall be valid and enforceable from the time of recording to pass the interest granted, pledged, assigned, or transferred as against the assignor, and shall be perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor.

(d) Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, deed of trust, conditional sales contract, or evidence of indebtedness which such assignment secures, the assignee shall thereafter be entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee shall be entitled to notify the tenant or other obligor to make payment to him and shall also be entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

(e) This section shall not exclude other methods of creating, perfecting, collecting, sequestering, or enforcing a security interest in rents, issues, or profits provided by the law of this State. (1829, c. 20; R.C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C.S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5; 1991, c. 234, s. 1.)

Editor's Note. — Session Laws 1991, c. 234, s. 1, amended this section effective October 1, 1991, and applicable to all assignments of leases, rents, issues, or profits, including collateral assignments, whether recorded prior to or after October 1, 1991.

CASE NOTES

I. In General.
II. Registration as Between Parties.
III. Persons Protected.
IV. Notice.

I. IN GENERAL.

The object of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

The purpose of this section is to prevent fraud, and liens registered under this Article are still subject to the common law of North Carolina for determination of their validity. The statute merely adds an additional requirement that a mortgagee must meet before successfully asserting an interest in rents and profits of a mortgaged property against third parties. It is designed to protect third parties. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

Section Intended Primarily to Protect, etc. — The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

This section is merely a recording statute that serves to protect third parties by giving record notice of a purported interest. Recordation does not serve to add to the substantive rights of a purported lien holder. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

No distinction is made, etc. — Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Construction of This Section and § 47-18, etc. — This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, § 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Anyone at any time can register papers in compliance with this section, but such recordation does not create a perfected security interest. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

Recordation Necessary to Perfect Security Interest in Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Applied in In re Blanks, 64 Bankr. 467 (Bankr. E.D.N.C. 1986).

Cited in In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990).

II. REGISTRATION AS BETWEEN PARTIES.

Defendant was not a "party" to deed of trust for purposes of the rule that as between parties the instrument first executed, rather than the one first registered, has lien priority, where she signed the instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Inapplicability of Registration Statutes to Parol and Constructive Trusts. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

III. PERSONS PROTECTED.

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

IV. NOTICE.

Sections Not Mere Notice Statutes for Protection of Third Parties. — Section 47-18 and this section are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

No Mere Notice, etc. —
In accord with the main volume. See Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The "witness" exception to the recordation requirement is not applicable in this jurisdiction. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Cited in Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.2. Place of registration; personal property.

Legal Periodicals. —
For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

(a) As used in this section, "after-acquired property clause" means any provision or provisions in an instrument which create a security interest in real property acquired by the grantor of the instrument subsequent to its execution.

(b) As used in this section, "after-acquired property," and "property subsequently acquired" mean any real property which the grantor of a security instrument containing an after-acquired property clause acquires subsequent to the execution of such instrument, and in which the terms of the after-acquired property clause would create a security interest.

(c) An after-acquired property clause is effective to pass after-acquired property as between the parties to the instrument containing such clause, but shall not be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument unless and until such instrument has been registered or reregistered at or subsequent to the time such after-acquired property is acquired by such grantor and the deed to the grantor of the after-acquired property is registered.

(d) In lieu of reregistering the instrument containing the after-acquired property clause as specified in subsection (c), such instrument may be made effective to pass title to after-acquired property as against lien creditors and purchasers for a valuable consideration from the grantor of the instrument by registering a notice of extension as specified in subsection (e) at or subsequent to the time of acquisition of the after-acquired property by the grantor.

(e) The notice of extension shall

(1) Show that effective registration of the after-acquired property clause is extended,

(2) Include the names of the parties to the instrument containing the after-acquired property clause,

(3) Refer to the book and page where the instrument containing the after-acquired property clause is registered, and

(4) Be signed by the grantee or the person secured by the instrument containing the after-acquired property clause or his successor in interest.

(f) The register of deeds shall index the notice of extension in the same manner as the instrument containing the after-acquired property clause.

(g) Except as provided in subsection (h) of this section, no instrument which has been heretofore executed or registered and which contains an after-acquired property clause shall be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of such instrument unless and until such instrument or a notice of extension thereof has been registered or reregistered as herein provided.

(h) Notwithstanding the provisions of this section with respect to registration, reregistration and registration of notice of extension, an after-acquired property clause in an instrument which creates a security interest made by a public utility as defined in G.S. 62-3(23) or a natural gas company as defined in section 2(6) of the Natural Gas Act, 15 U.S.C.A. 717a(6), or by an electric or telephone membership corporation incorporated or domesticated in North Carolina shall be effective to pass after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument from the time of original registration of such instrument. (1967, c. 861, s. 1; 1969, c. 813, ss. 1-3; 1997-386, s. 1.)

Effect of Amendments. — The 1997 amendment, effective August 11, 1997, and applicable to instruments registered before, on, or after the effective date, except that it shall not apply to litigation pending on the effective date or to any instrument directly or indirectly involved in litigation pending on that date, in subsection (c) inserted "registered or", and added "and the deed to the grantor of the after-acquired property is registered."

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-26. Deeds of gift.

CASE NOTES

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Cited in Hayes v. Turner, 98 N.C. App. 451, 391 S.E.2d 513 (1990).

§ 47-27. Deeds of easements.

CASE NOTES

Applicability to Board of Transportation. — In accord with second paragraph in the main volume. DOT v. Auten, 106 N.C. App. 489, 417 S.E.2d 299 (1992).

Applicability to Department of Transportation. — This section, which governs deeds for rights-of-way and easements, provides that the Department of Transportation does not have to record such interests in land which were acquired prior to July 1, 1959. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

Where a property interest spans more than one county, it is only effective against other claimants in the counties in which it has been recorded. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Race to the Courthouse. — As North Carolina is a pure race jurisdiction, where defendants failed to register their grant of easement in Person County before plaintiffs registered their deed there, plaintiffs won the "race to the courthouse," and their interest superseded the later-recorded interest claimed by defendants. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Purchaser for Value. — North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser." A "purchaser for value" or a "purchaser for valuable consideration" is simply defined as one who has paid a valuable consideration for the execution of an instrument of conveyance. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

§ 47-29.1. Recordation of waste disposal on land.

(a) A permit for the disposal of waste on land shall be recorded as provided in G.S. 130A-301. The disposal of land clearing and inert debris in a landfill with a disposal area of 1/2 acre or less pursuant to G.S. 130A-301.1 shall be recorded as provided in G.S. 130A-301.1(c). A Notice of Open Dump shall be recorded as provided in G.S. 130A-301(f). The disposal of demolition debris in an on-site landfill having a disposal area of one acre or less shall be recorded as provided in G.S. 130A-301.2.

(b) An inactive hazardous substance or waste disposal site shall be recorded as provided in G.S. 130A-310.8. (1995, c. 502, s. 2.1; 1997-330, s. 1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 502, s. 2.1 having been § 47-28.

Session Laws 1995, c. 502, which enacted this section effective July 28, 1995, in s. 4 provides that the second sentence of subsection (a) expires June 30, 2001.

Effect of Amendments. — The 1997 amendment, effective July 25, 1997, added the second and third sentences of subsection (a).

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;
(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or
(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat" and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use. In those counties in which the register has made a security copy of the plat from which legible copies can be made, the original may be returned to the person indicated on the plat.

(c) Information Contained in Title of Plat. — The title of each plat shall contain the following information: property designation, name of owner (the name of owner shall be shown for indexing purposes only and is not to be construed as title certification), location to include township, county and state, the date or dates the survey was made; scale or scale ratio in words or figures and bar graph; name and address of surveyor or firm preparing the plat.

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision the survey or plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, ………., certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book ……., page …., etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book …….., page ….; that the ratio of precision as calculated is 1: ….; that this plat was prepared in accordance with G.S. 47-30 as amended. Witness my original signature, registration number and seal this …… day of ……., A.D., 19….

Seal or Stamp

…………………………
Surveyor
Registration Number"

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of any inaccessible areas when the areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) the index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where the monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of the monument are on file in the North Carolina Office of State Planning, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27," indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be

used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in a portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. Any one of the following:

1. That the survey is of an existing parcel or parcels of land and does not create a new street or change an existing street;

2. That the survey is of an existing building or other structure, or natural feature, such as a watercourse; or

3. That the survey is a control survey.

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of the surveyor's professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — In certifying a plat for recording pursuant to G.S. 47-30.2, the Review Officer shall not be responsible for reviewing or certifying as to any of the following requirements of this section:

(1) Subsection (b) of this section as to archival.

(2) Repealed by Session Laws 1997-309, s. 2, effective October 1, 1997.

(3) Subsection (e) of this section.

(4) Subdivisions (1) through (10) of subsection (f) of this section.

A plat, when certified pursuant to G.S. 47-30.2 and presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to the Review Officer pursuant to G.S. 47-30.2 to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136.

(m) Except as provided in subsection (n), any map submitted for inclusion on the public record, whether submitted alone or attached to a deed or other instrument, shall be prepared by a registered land surveyor. Such a map shall either (i) have an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors or (ii) be a copy of a map, already on file in the public record, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for inclusion in the public record only for illustrative purposes and only if the map is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND NO RELIANCE MAY BE PLACED IN ITS ACCURACY." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2; 1997-309, s. 2; 1997-443, s. 11A.119(a).)

Editor's Note. —

Session Laws 1987, c. 747, s. 25 provides that as used in c. 747, which amended subdivision (*l*), the word "municipality" means a "city" as defined by § 160A-1.

Session Laws 1987, c. 747, s. 26 is a severability clause.

Session Laws 1991 (Reg. Sess., 1992), c. 1030, s. 51.16 provides: "The General Statutes Commission will study the requirements of G.S. 47-30(m) and G.S. 89C-26 to determine whether it is possible to provide for a photographic copy of a map to be attached to a deed or other instrument without requiring an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors, while still protecting the public and assuring that maps have not been altered prior to submission for recording. The General Statutes Commission shall report its findings and recommendations to the 1993 General Assembly and shall submit its report not later than January 31, 1993 to the President Pro Tempore of the

Senate and the Speaker of the House of Representatives."

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-309, s. 2, effective October 1, 1997, added the last sentence of subsection (b); in subsection (d) deleted the fourth and fifth sentences, which read "The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the registered land surveyor preparing the plat. All plats to be recorded shall be probated as required by law for the registration of deeds", and deleted the form of the certificate of the Notary; in subdivision (f)(9) substituted "Office of State Planning" for "Department of Environment, Health, and Natural Resources"; in subdivision (f)(11)c. added "Any one of the following"; in subdivision (f)(11)c.1. inserted "and does not create a new street or change an existing street"; added subdivisions (f)(11)c.2. and (f)(11)c.3.; rewrote subsection (g); inserted "to the Review Officer pursuant to G.S. 47-30.2" in subsection (h); deleted the last two sentences of subsection (k), which read "Where local law is in conflict with this section, the provisions in this section shall apply. Failure of a plat to conform in all requirements of this statute shall be sufficient grounds for the register of deeds to refuse to accept the plat for recordation"; and made stylistic changes.

Session Laws 1997-443, s. 11A.119(a), effective August 28, 1997, substituted "Environment and Natural Resources" for "Environment, Health, and Natural Resources."

CASE NOTES

Certification Required. — A survey of a division of land that is described in § 153A-335(2) falls under subdivision (f)(11)(d) and requires a certification of "no approval required" before the plat may be presented for recordation. Three Guys Real Estate v. Harnett County, 345 N.C. 468, 480 S.E.2d 681 (1997).

OPINIONS OF ATTORNEY GENERAL

This section applies only to those maps or plats presented to the Register of Deeds for recording in his office. Whether or not the plat or map should be made to comply with this section and recorded depends on the purpose for which it is to be used. See opinion of Attorney General to Mr. Joe B. Freeman, Register of Deeds, Robeson County, 59 N.C.A.G. 1 (1989).

§ 47-30.2. Review Officer.

(a) The board of commissioners of each county shall, by resolution, designate by name one or more persons experienced in mapping or land records management as a Review Officer to review each map and plat required to be submitted for review before the map or plat is presented to the register of deeds for recording. Each person designated a Review Officer shall, if reasonably feasible, be certified as a property mapper pursuant to G.S. 147-54.4. A resolution designating a Review Officer shall be recorded in the county registry and indexed on the grantor index in the name of the Review Officer.

(b) The Review Officer shall review expeditiously each map or plat required to be submitted to the Officer before the map or plat is presented to the register of deeds for recording. The Review Officer shall certify the map or plat if it complies with all statutory requirements for recording.

Except as provided in subsection (c) of this section, the register of deeds shall not accept for recording any map or plat required to be submitted to the Review Officer unless the map or plat has the certification of the Review Officer affixed to it. A certification shall be in substantially the following form:

State of North Carolina
County of
I, ..., Review Officer of .... County, certify that the map or plat to which this certification is affixed meets all statutory requirements for recording.

....
Review Officer
Date

(c) A map or plat must be presented to the Review Officer unless the certificate required by G.S. 47-30(f)(11) shows that the map or plat is a survey within the meaning of G.S. 47-30(f)(11)b. or c. (1997-309, s. 3.)

Editor's Note. — Session Laws 1997-309, s. 15, made this section effective October 1, 1997.

§ 47-31. Certified copies may be registered; used as evidence.

(a) A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county without further certification pursuant to G.S. 47-14; and the registered or duly certified copy of any deed or writing that has been registered in the county where the land is situate may be given in evidence in any court of the State.

(b) Instruments registered pursuant to this section prior to July 6, 1993 that were not further certified pursuant to G.S. 47-14 at the time of registration are hereby validated. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319; 1993, c. 288, ss. 2, 3.)

Editor's Note. — This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1993, c. 288, s. 3, amended this section effective July 6, 1993, and applicable to assignments made on or after that date, by adding present subsection (b).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

§ 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a Class 3 misdemeanor and upon conviction shall be subject only to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2; 1993, c. 539, s. 408; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 539, s. 408 amended this section effective October 1, 1994, and applicable to offenses occurring on or after that date, by inserting "Class 3" preceding "misdemeanor" and inserting "only" following "shall be subject" in the first paragraph.

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

Session Laws 1987, c. 360, s. 1 amended this section effective June 12, 1987, and applicable to corrections made on or after that date, by inserting the present third sentence.

CASE NOTES

No Continuing Duty to Correct Errors. — There was no merit to plaintiff's allegations that this section creates a continuing duty to correct errors and that defendant's failure to correct errors in deeds constituted a breach of fiduciary duty. Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997).

Quoted in Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.

Local Modification. — Martin County: 1987 (Reg. Sess., 1988), c. 925.

§ 47-38. Acknowledgment by grantor.

CASE NOTES

Acknowledgment in Compliance with Section. — An acknowledgment to a will, upon which the name and title of the official taking the acknowledgment and the name of the maker as well as the witness was provided, their personal appearance was ascribed by the phrase "sworn to ... before me", the date and year of the acknowledgment were provided, the notary's signature and her seal were affixed thereto, and the phrase "sworn to and subscribed before me" appeared prominently below the signatures of the maker and witness, substantially conformed to the statutory provisions of this section. In re Hess, 104 N.C. App. 75, 407 S.E.2d 594 (1991).

§ 47-41: Repealed by Session Laws 1991, c. 647, s. 3, effective October 1, 1991.

Cross References. — As to corporate conveyances, see now §§ 47-41.01, 47-41.02.

Editor's Note. — Session Laws, 1991, c. 647, s. 3, which repealed this section, provides: "The provision of G.S. 47-41 shall continue to apply to all instruments executed before the effective date [October 1, 1991] of this section of this act."

§ 47-41.01. Corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the deed or other instrument is executed by the corporation's chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer signing the name of such corporation by him as such officer, is sealed with its common or corporate seal, and is attested by another person who is its secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or, in case of a bank, its secretary, assistant secretary, cashier or assistant cashier, the following form of acknowledgment is sufficient:

....
(State and county, or other
description of place where
acknowledgment is taken)
I, ..., ...,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)
certify that .... personally came before
(Name of secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
me this day and acknowledged that he (or she) is ....
(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
of ...., a corporation, and that by authority duly
(Name of corporation)
given and as the act of the corporation, the foregoing instrument was signed in its name by its ....,
(Chairman, president, chief executive officer, vice-president, assistant vice-president, treasurer, or chief financial officer)
sealed with its corporate seal, and attested by himself (or herself) as its ....
(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
Witness my hand and official seal, this the .... day of
...........,
(Month)
....
(Year)
....
(Signature of officer taking acknowledgment)
(Official seal, if officer taking
acknowledgment has one)
My commission expires ....
(Date of expiration of commission as notary public)

(1) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(2) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment. The fact that these words and this date

may be located in a position on the form different from the position indicated in this subsection does not by itself invalidate the form.

(3) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk, or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered. (1991, c. 647, s. 4; 1995 (Reg. Sess., 1996), c. 742, s. 18.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7, made this section effective October 1, 1991.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, transferred "My commission expires ...." and "(Date of expiration of commission as notary public)" from below "(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)" to below "(Official seal, if officer taking acknowledgment has one)" in the acknowledgment form in subsection (b); and added the last sentence of subdivision (b)(2).

§ 47-41.02. Other forms of probate for corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall also be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This ...... day of .... A.D. ...., personally came before me (here give the name and official title of the officer who signs this certificate) A.B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C.D., who is the president (or presiding member or trustee), and also with E.F. and G.H., two other members of said corporation; and that he, the said A.B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this ...... day of .... (year).

(Official seal.)

....

(Signature of officer.)

(c) If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ... County.

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of the officer who signs the certificate) A.B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C.D., who is the president of said corporation, and that he, the said A.B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A.B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A.B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the .... day of ...... (year).

(Official seal.)

....

(Signature of officer.)

North Carolina, ... County.

This is to certify that on the ...... day of ......, 19...., before me personally came .... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ...... is the president (or vice-president), and ...... is the secretary (or assistant secretary) of the ......, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ...... day of ...... (year).

(Official seal.)

....

(Signature of officer.)

(d) If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of officer who signs the certificate) A.B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the ...... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A.B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

....

(Signature of officer.)

(e) All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

(f) The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust, and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina
.... County
I, ..., do hereby certify that ....
(Name of president, secretary or treasurer)
personally came before me this day and acknowledged that he is
.... of .... and acknowledged,
(President, secretary or treasurer) (Name of corporation)
on behalf of ...., the grantor, the due
(Name of corporation)
execution of the foregoing instrument.
Witness my hand and official seal, this ..... day of ....., 19.....
(Official seal)
....
(Title of officer)

....
(Name of state)
....
(County)
I, ...
(Name of officer taking proof) (Official title of officer taking proof)
of ...., certify that
(County) (Name of state)
.... personally appeared before
(Name of subscribing witness)
me, and being duly sworn, stated that in his presence
....
(Name of president, secretary or treasurer of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)
Witness my hand and official seal, this .... day of
.................., 19.........
(Month) (Year)
....
(Signature of official taking proof)
....
(Official title of official taking proof)
My commission expires ....
(Date of expiration of official's commission)

(g) All deeds and other conveyances executed on or before April 12, 1974, by the president, any vice-president, assistant vice-president, manager, comptroller, treasurer, assistant treasurer, trust officer or assistant trust officer, or chairman or vice-chairman of a corporation are hereby validated to the extent that such deeds or other conveyances were otherwise properly executed, probated, and recorded. (1991, c. 647, s. 5; 1991 (Reg. Sess., 1992), c. 1030, s. 14.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7 made this section effective October 1, 1991.

§ 47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

The form of a notice of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(5) shall be substantially as follows:

North Carolina, ... County.

I, ... (name of trustee or mortgagee), certify that the debt or other obligation in the amount of .... secured by the (deed of trust) (mortgage) (other instrument) executed by .... (grantor) (mortgagor), ... (trustee) (leave blank if mortgage), and .... (beneficiary) (mortgagee), and recorded in .... County at .... (book and page) was satisfied on .... (date of satisfaction).

....
(Signature of trustee or mortgagee)

I, ... (name of officer taking acknowledgment), ... (official title of person taking acknowledgment) certify that .... (name of trustee or mortgagee) personally came before me this day and acknowledged the satisfaction of the provisions of the above-referenced (deed of trust) (mortgage) (other instrument).

Witness my hand and official seal this the .... day of .... (month), ... (year).

....
(Signature of officer taking acknowledgment)

My commission expires .... (Date of expiration of official's commission).

North Carolina, ... County.

The foregoing acknowledgment of .... (name of officer that took acknowledgment), ... (official title of person that took acknowledgment), is certified to be correct.

This .... (day) of .... (month), ... (year).

....
(Signature of Register of Deeds).

(1987, c. 405, s. 2; c. 662, s. 4; 1989, c. 434, s. 2.)

Editor's Note. — Session Laws 1987, c. 405, s. 3 made this section effective 30 days after ratification. The act was ratified June 18, 1987.

Session Laws 1989, c. 434, s. 2, amended this section effective retroactively to July 18, 1987 and applicable to all applications for notice of satisfaction of a deed of trust, mortgage, or other instrument made on or after that date.

§ 47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.

The form of a certificate of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(6) shall be substantially as follows:

CERTIFICATE OF SATISFACTION

North Carolina, ____________________ County.

I, ____________________ (name of owner of the note or other indebtedness secured by the deed of trust or mortgage), certify that I am the owner of the indebtedness secured by the hereafter described deed of trust or mortgage and that the debt or other obligation in the amount of ____________________ secured by the (deed of trust) (mortgage) (other instrument) executed by ____________________ (grantor) (mortgagor), ____________________ (trustee) (leave blank if mortgage), and ____________________ (beneficiary) (mortgagee), and recorded in ____________________ County at ____________________ (book and page) was satisfied on ____________________ (date of satisfaction). I request that this certificate of satisfaction be recorded and the above-referenced security instrument be canceled of record.

____
(Signature of owner of note)

[Acknowledgment before officer authorized to take acknowledgments]. (1995, c. 292, s. 3.)

Editor's Note. — Session Laws 1995, c. 292, s. 7, made this section effective October 1, 1995.

§ 47-46.3. Affidavit of lost note.

The form of an affidavit of lost note, if required pursuant to G.S. 45-37(a)(6), shall be substantially as follows:

AFFIDAVIT OF LOST NOTE

[Name of affiant] personally appeared before me in ____________________ County, State of ____________________, and having been duly sworn (or affirmed) made the following affidavit:

1. The affiant is the owner of the note or other indebtedness secured by the deed of trust, mortgage, or other instrument executed by ____________________ (grantor, mortgagor), ____________________ (trustee), and ____________________ (beneficiary, mortgagee), and recorded in ____________________ County at ____________________ (book and page); and
2. The note or other indebtedness has been lost and after the exercise of due diligence cannot be located.
3. The affiant certifies that all indebtedness secured by the deed of trust, mortgage, or other instrument was satisfied on ____________________, 19 ______

(date of satisfaction), and the affiant is responsible for cancellation of the same.

____

(Signature of affiant)

Sworn to (or affirmed) and subscribed before me this ________ day of ____________________, 19 ___.

[Signature and seal of notary public or other official authorized to administer oaths]. (1995, c. 292, s. 4; 1995 (Reg. Sess., 1996), c. 604, s. 2; c. 742, s. 19.)

Editor's Note. — Session Laws 1995, c. 292, s. 7, made this section effective October 1, 1995.

This section was amended by Session Laws 1995 (Reg. Sess., 1996), c. 604, s. 2, and c. 742, s. 19, the amendments being similar. The section is set out above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 604, s. 2, effective June 21, 1996, substituted "was satisfied on ____________, 19 ___" for "has been satisfied" in subdivision 3 of the affidavit.

Session Laws 1995 (Reg. Sess., 1996), c. 742, s. 19, effective June 21, 1996, substituted "was satisfied on ____________ (date of satisfaction)" for "has been satisfied" in subdivision 3 of the affidavit.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to April 1, 1980. (1917, c. 237; C.S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11; 1973, c. 1402; 1987, c. 360, s. 2.)

Editor's Note. — Session Laws 1987, c. 360, s. 2, amended this section effective June 12, 1987, and applicable to corrections made on or after that date, by substituting "April 1, 1980" for "April 1, 1974" at the end of the section.

§ 47-50. Order of registration omitted.

In all cases prior to December 31, 1992, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C.S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79; 1981, c. 812; 1993, c. 80, s. 1.)

Editor's Note. — Session Laws 1993, c. 80, s. 2, provides that the act does not affect litigation pending on ratification (May 25, 1993).

§ 47-51. Official deeds omitting seals.

All deeds executed prior to January 1, 1991, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2; 1987, c. 277, s. 2; 1989, c. 390, s. 2; 1991, c. 489, s. 2.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January 1, 1991: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3; 1987, c. 277, s. 3; 1989, c. 390, s. 3; 1991, c. 489, s. 3.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-53.1. Acknowledgment omitting seal of notary public.

Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to January 1, 1991. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4; 1987, c. 277, s. 4; 1989, c. 390, s. 4; 1991, c. 489, s. 4.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-54.1. Registration by register's assistants or deputies.

All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's assistant or deputy, and signed in the name of the register of deeds by the assistant or deputy, and initialed by the assistant or deputy, instead of being signed by them as assistant or deputy, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed by the assistant or deputy in the respective capacity. (1991 (Reg. Sess., 1992), c. 877, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 877, s. 2 made this section effective upon ratification. The act was ratified July 7, 1992.

§ 47-71.1. Corporate seal omitted prior to January 1, 1991.

Any corporate deed, or conveyance of land in this State, made prior to January 1, 1991, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5; 1987, c. 277, s. 5; 1989, c. 390, s. 5; 1991, c. 489, s. 5.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-100. Acknowledgments taken by officer who was grantor.

In all cases where a deed or deeds dated prior to the first day of January, 1980, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1980, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986; 1991 (Reg. Sess., 1992), c. 1030, s. 51.8.)

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to January 1, 1991, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6; 1987, c. 277, s. 6; 1989, c. 390, s. 6; 1991, c. 489, s. 6.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1995 or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7; 1987, c. 277, s. 7; 1989, c. 390, s. 7; 1991, c. 489, s. 7; 1995, c. 163, s. 16.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

§ 47-108.21. Sales for 1930 on dates other than first Monday in June validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year of 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-387. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-388. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.23. Tax sales for 1933-34 and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-389. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.24. Notices of sale for taxes by publication validated.

All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-390. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.25. Validation of sales and resales held pursuant to § 105-374.

All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-391. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Sections 1-327 and 1-328, referred to in this section, were repealed by Session Laws 1949, c. 719, s. 2. Section 45-28, referred to in this section, was repealed by Session Laws 1949, c. 720, s. 5.

§ 47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-392. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-112. Forgery or alteration of discharge or certificate; punishment.

Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1921, c. 198, s. 4; C.S., s. 3366(n); 1993, c. 539, s. 409; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 409, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2, effective October 1, 1983.

Cross References. — As to powers of attorney, see now § 32A-1 et seq. As to effect of powers of attorney executed pursuant to § 47-115.1 prior to October 1, 1983, see § 32A-14.

Chapter 47A.

Unit Ownership.

ARTICLE 1.

Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996); Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

§ 47A-2. Declaration creating unit ownership; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-3. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

Developer as Unit Owner. — Neither the definition of "unit owner" nor the provisions of § 47A-12 make any distinction between a developer and any other unit owner; defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" and was bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common areas and facilities. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-4. Property subject to Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-5. Nature and incidents of unit ownership.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-6. Undivided interests in common areas and facilities; ratio fixed in declaration; conveyance with unit.

CASE NOTES

Cited in Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-8. Use of common areas and facilities.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Incorporated condominium homeowners' association lacked standing to sue in its own name to enforce various restrictions on activity at the condominiums. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

To receive preliminary injunction, plaintiff must show likelihood of success on merits and some type of irreparable harm. This standard, however, does not require showing that injury is beyond repair, but that injury is one to which complainant should not be required to submit or other party permitted to inflict. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Decision by trial court to issue or deny injunction will be upheld if there is ample competent evidence to support decision, even though evidence may be conflicting and appellate court could substitute its own findings. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

§ 47A-12. Unit owners to contribute to common expenses; distribution of common profits.

CASE NOTES

Purpose. — The provisions of this section are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas when other unit owners, including the developer, attempt to unilaterally exempt themselves from contributing their pro rata share of maintenance expenses. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Developer as Unit Owner. — Neither the definition of "unit owner" in § 47A-3 nor the provisions of this section make any distinction between a developer and any other unit owner; defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" and was bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common areas and facilities. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Developer Not Exempt. — The legislature did not intend to allow a developer, as a unit owner, to unilaterally exempt itself from the payment of its pro rata share of the maintenance expenses for the common areas. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986); Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-18. Bylaws; annexed to declaration; amendments.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-19. Bylaws; contents.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The bylaws must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-21. Units taxed separately.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

§ 47A-28. Persons subject to Article, declaration and bylaws; effect of decisions of association of unit owners.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

Article 2.

Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Chapter 47B.

Real Property Marketable Title Act.

Sec.
47B-3. Exceptions.

§ 47B-1. Declaration of policy and statement of purpose.

Legal Periodicals. —

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Cited in Whatley v. Whatley, — N.C. App. —, 484 S.E.2d 420 (1997).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

In order to prove title to land under the Real Property Marketable Title Act, defendant had to establish: (1) that defendant, alone or together with his predecessors in title, was vested with an estate in real property which had been of record for at least thirty years; (2) the public record showed a title transaction at least thirty years old which purported to vest title in defendant or some other person from whom, by one or more title transactions, the property had passed to defendant; and (3) that nothing appeared of record to divest defendant of the estate. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Applied in Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986); Younce v. United States, 661 F. Supp. 482 (W.D.N.C. 1987); Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989).

Cited in Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992).

§ 47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to

such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracts. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for any one of the following purposes:

  a. Flowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist.

  b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

  c. Conserving land or water areas pursuant to a conservation agreement or preserving a structure or site pursuant to a preservation agreement under Article 4 of Chapter 121 of the General Statutes.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B. (1973, c. 255, s. 1; 1995, c. 443, s. 3.)

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

Chapter 47C.

North Carolina Condominium Act.

Article 1.

General Provisions.

Sec.
47C-1-102. Applicability.

Article 2.

Creation, Alteration, and Termination of Condominiums.

Sec.
47C-2-109. Plats and plans.

Editor's Note. — The Official Commentary to the Uniform Condominium Act has been printed through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Condominium Act, with Commentary, may be ordered from them at a cost of $4.00 at 676 North St. Clair, Chicago, Illinois 60611, (312) 915-0195.

ARTICLE 1.

General Provisions.

§ 47C-1-101. Short title.

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996); Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

§ 47C-1-102. Applicability.

(a) This chapter applies to all condominiums created within this State after October 1, 1986. Sections 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-107A (Charges for Late Payment, Fines), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State on or before October 1, 1986; but those sections apply only with respect to events and circumstances occurring after October 1, 1986 and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

(b) The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (G.S. 47C-4-102 through 47C-4-108) apply to all contracts for the dispositions thereof signed in this State by any party unless exempt under G.S. 47C-4-101(b). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1995, c. 509, s. 135.1(h).)

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996); Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

§ 47C-1-103. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

Article 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-105. Contents of declaration.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-109. Plats and plans.

(a) The declarant shall file with the register of deeds in each county where the condominium is located the condominium's plat or plan prepared in accordance with this section. The plat or plan shall be considered a part of the declaration but shall be recorded separately, and the declaration shall refer by number to the file where such plat or plan is recorded. Each plat or plan shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to be recorded, numbered serially in the order of receipt, and designated "Condominium" with the name of the building, if any, and shall contain a reference to the book and page numbers and date of the recording of the declaration. Each plat or plan must contain a certification by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes that it contains all of the information required by this section.

(b) Each plat or plan or combination thereof must show:

(1) The name and a survey or general schematic map of the entire condominium;

(2) The location and dimensions of all real estate not subject to development rights or subject only to the development right to withdraw and the location and dimensions of all existing improvements within that real estate;

(3) The location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) The extent of any encroachments by or upon any portion of the condominium;

(5) The location and dimensions of all easements having specific location and dimensions and serving or burdening any portion of the condominium;

(6) The verified statement of an architect licensed under the provisions of Chapter 83A of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes certifying that such plats or plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built;

(6a) The certificate by a registered land surveyor licensed under the provisions of Chapter 89C of the General Statutes stating that the plats or plans accurately depict the legal boundaries and the physical location of the units and other improvements relative to those boundaries;

(7) The locations and dimensions of limited common elements; however, parking spaces and the limited common elements described in subsections 47C-2-102(2) and (4) need not be shown, except for decks, stoops, porches, balconies, and patios;

(8) A legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) The distance between noncontiguous parcels of real estate comprising the condominium;

(10) Any unit in which the declarant has reserved the right to create additional units or common elements.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (c) or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(e) In order to be recorded, plats or plans filed shall:

(1) Be reproducible plats or plans on cloth, linen, film, or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings or suitable scale to assure legibility require, plats or plans may be placed on two or more sheets with appropriate match lines.

(f) The fee for recording each plat or plan sheet submitted shall be as prescribed by G.S. 161-10(a)(3). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1987, c. 282, s. 8; 1989, c. 571.)

Editor's Note. — Session Laws 1989, c. 571, amended this section effective October 1, 1989 and applicable to all plats and plans filed with the register of deeds on or after that date, by adding subdivision (b)(6a).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-110. Exercise of development rights.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

Article 3.

Management of the Condominium.

§ 47C-3-102. Powers of unit owners' association.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Applicability of Fee Provision. — Fee provision in new Condominium Act was not made applicable to existing condominium associations. Miesch v. Ocean Dunes Homeowners Ass'n, 120 N.C. App. 559, 464 S.E.2d 64 (1995).

§ 47C-3-105. Termination of contracts and leases of declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-112. Conveyance or encumbrance of common elements.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-115. Assessments for common expense.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-116. Lien for assessments.

CASE NOTES

Fine for Each Day of Continued Violation. — Board of directors of homeowners association did not exceed its authority in levying a fine of $100 for each day plaintiff continued in violation of condominium rule, by altering the outside of her home. Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995).

§ 47C-3-117. Other liens affecting the condominium.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 4.

Protection of Purchasers.

§ 47C-4-110. Escrow of deposits.

CASE NOTES

Evidence Regarding Requirement. — Deposit money given to reserve a condominium unit under this section was still rightfully owned by the purchaser were required to be placed in escrow. It follows that it was not error for the trial judge to deny defendant's motion in limine to exclude evidence indicating such a requirement. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Testimony Regarding Absence of Criminal Sanctions. — Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of this section is not subject to criminal sanctions. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

§ 47C-4-114. Implied warranties of quality.

Legal Periodicals. — For comment, "From Caveat Emptor to Consumer Equity — The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act," see 27 Wake Forest L. Rev. 571 (1992).

§ 47C-4-117. Effect of violations on rights of action; attorney's fees.

CASE NOTES

Attorney's Fees. — Had the General Assembly wished that the recovery of attorney's fees under the Condominium Act be governed by § 6-21.2, they could have included language to that effect. This section is a subsequently enacted, more specific statute which will be used. Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

Chapter 47E.

Residential Property Disclosure Act.

Sec.
47E-1. Applicability.
47E-4. (Effective October 1, 1998) Required disclosures.
47E-5. Time for disclosure; cancellation of contract.

Sec.
47E-6. Owner liability for disclosure of information provided by others.
47E-8. Agent's duty.

§ 47E-1. Applicability.

This Chapter applies to the following transfers of residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesman:

(1) Sale or exchange,
(2) Installment land sales contract,
(3) Option, or
(4) Lease with option to purchase, except as provided in G.S. 47E-2(10). (1995, c. 476, s. 1; 1997-472, s. 5.)

Effect of Amendments. — The 1997 amendment, effective September 2, 1997, substituted "G.S. 47E-1-2(10)" for "G.S. 47E-2(10)" in subdivision (4).

§ 47E-4. (Effective October 1, 1998) Required disclosures.

(a) With regard to transfers described in G.S. 47E-1, the owner of the real property shall furnish to a purchaser a residential property disclosure statement. The disclosure statement shall:

(1) Disclose those items which are required to be disclosed relative to the characteristics and condition of the property and of which the owner has actual knowledge; or
(2) State that the owner makes no representations as to the characteristics and condition of the real property or any improvements to the real property except as otherwise provided in the real estate contract.

(b) The North Carolina Real Estate Commission shall develop and require the use of a standard disclosure statement to comply with the requirements of this section. The disclosure statement shall specify that certain transfers of residential property are excluded from this requirement by G.S. 47E-2, including transfers of residential property made pursuant to a lease with an option to purchase where the lessee occupies or intends to occupy the dwelling, and shall include at least the following characteristics and conditions of the property:

(1) The water supply and sanitary sewage disposal system;
(2) The roof, chimneys, floors, foundation, basement, and other structural components and any modifications of these structural components;
(3) The plumbing, electrical, heating, cooling, and other mechanical systems;
(4) Present infestation of wood-destroying insects or organisms or past infestation the damage for which has not been repaired;

§ 47E-4 has a delayed effective date. See notes.

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(5) The zoning laws, restrictive covenants, building codes, and other land-use restrictions affecting the real property, any encroachment of the real property from or to adjacent real property, and notice from any governmental agency affecting this real property; and

(6) Presence of lead-based paint, asbestos, radon gas, methane gas, underground storage tank, hazardous material or toxic material (whether buried or covered), and other environmental contamination.

The disclosure statement shall provide the owner with the option to indicate whether the owner has actual knowledge of the specified characteristics or conditions, or the owner is making no representations as to any characteristic or condition.

(c) The rights of the parties to a real estate contract as to conditions of the property of which the owner had no actual knowledge are not affected by this Article unless the residential disclosure statement states that the owner makes no representations as to those conditions. If the statement states that an owner makes no representations as to the conditions of the property, then the owner has no duty to disclose those conditions, whether or not the owner should have known of them. (1995, c. 476, s. 1.; 1997-472, s. 1.)

Section Set Out Twice. — The section above is effective October 1, 1998. For the section as in effect until October 1, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-472, s. 6, provides in part: "Effective when this act becomes law [September 2, 1997], the North Carolina Real Estate Commission is authorized to develop the standard disclosure statement under the amendments made by this act to G.S. 47E-4(b) to become effective October 1, 1998."

Effect of Amendments. — The 1997 amendment, effective October 1, 1998, and applicable to to contracts entered into on or after that date, in subsection (a) substituted the second sentence of the introductory language for "The disclosure statement shall contain the language and be in the form set forth in subsection (b) of this section. The statement shall", and inserted "characteristics and" in subdivisions (1) and (2); and rewrote subsection (b).

§ 47E-5. Time for disclosure; cancellation of contract.

(a) The owner of real property subject to this Chapter shall deliver to the purchaser the disclosure statement required by this Chapter no later than the time the purchaser makes an offer to purchase, exchange, or option the property, or exercises the option to purchase the property pursuant to a lease with an option to purchase. The residential property disclosure statement may be included in the real estate contract, in an addendum, or in a separate document.

(b) If the disclosure statement required by this Chapter is not delivered to the purchaser prior to or at the time the purchaser makes an offer, the purchaser may cancel any resulting real estate contract. The purchaser's right to cancel shall expire if not exercised prior to the following, whichever occurs first:

(1) The end of the third calendar day following the purchaser's receipt of the disclosure statement;

(2) The end of the third calendar day following the date the contract was made;
(3) Settlement or occupancy by the purchaser in the case of a sale or exchange; or
(4) Settlement in the case of a purchase pursuant to a lease with option to purchase.

Any right of the purchaser to cancel the contract provided by this subsection is waived conclusively if not exercised in the manner required by this subsection.

In order to cancel a real estate contract when permitted by this section, the purchaser shall, within the time required above, give written notice to the owner or the owner's agent either by hand delivery or by depositing into the United States mail, postage prepaid, and properly addressed to the owner or the owner's agent. If the purchaser cancels a real estate contract in compliance with this subsection, the cancellation shall be without penalty to the purchaser, and the purchaser shall be entitled to a refund of any deposit the purchaser may have paid. Any rights of the purchaser to cancel or terminate the contract for reasons other than those set forth in this subsection are not affected by this subsection. (1995, c. 476, s. 1; 1997-472, s. 2.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, and applicable to contracts entered into on or after that date, in subsection (a) substituted "disclosure statement" for "written disclosures", and "the" for "such" preceding "purchaser"; and rewrote subsection (b).

§ 47E-6. Owner liability for disclosure of information provided by others.

The owner may discharge the duty to disclose imposed by this Chapter by providing a written report attached to the residential property disclosure statement by a public agency or by an engineer, land surveyor, geologist, pest control operator, contractor, home inspector or other expert, dealing with matters within the scope of the public agency's functions or the expert's license or expertise. The owner shall not be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section if the error, inaccuracy, or omission was made in reasonable reliance upon the information provided by the public agency or expert and the owner was not grossly negligent in obtaining the information or transmitting it. (1995, c. 476, s. 1; 1997-472, s. 3.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, and applicable to contracts entered into on or after that date, deleted "If the owner chooses to provide a disclosure of property condition pursuant to G.S. 47E-4" from the beginning of this section, and inserted "imposed by this Chapter".

§ 47E-8. Agent's duty.

A real estate broker or salesman acting as an agent in a residential real estate transaction has the duty to inform each of the clients of the real estate broker or salesman of the client's rights and obligations under this Chapter. Provided the owner's real estate broker or salesman has performed this duty, the broker or salesman shall not be responsible for the owner's willful refusal to provide a prospective purchaser with a residential property disclosure statement. Nothing in this Chapter shall be construed to conflict with, or alter, the broker or salesman's duties under Chapter 93A of the General Statutes. (1995, c. 476, s. 1; 1997-472, s. 4.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, and applicable to contracts entered into on or after that date, substituted "an agent in a residential real estate transaction has the duty to inform each of the clients of the real estate broker or salesman of the client's" for "the agent of the owner of residential real property has the duty to inform the owner of the owner's".

Chapter 48.

Adoptions.

Article 1.

General Provisions.

Sec.
48-1-101. Definitions.

Article 2.

General Adoption Procedure.

Part 2. General Procedural Provisions.

48-2-206. Prebirth determination of right to consent.

Part 3. Petition for Adoption.

48-2-303. Caption of petition for adoption.
48-2-305. Petition for adoption; additional documents.

Part 4. Notice of Pendency of Proceedings.

48-2-401. Notice by petitioner.
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Part 5. Report to the Court.

48-2-501. Report to the court during proceeding for adoption of a minor.
48-2-502. Preparation and content of report.
48-2-503. Timing and filing of report.

Part 6. Dispositional Hearing; Decree of Adoption.

48-2-601. Hearing on, or disposition of, adoption petition; timing.
48-2-604. Denying petition to adopt a minor.

Article 3.

Adoption of Minors.

Part 2. Placement of Minors for Adoption.

48-3-201. Who may place minors for adoption.

Part 3. Preplacement Assessment.

Sec.
48-3-301. Preplacement assessment required.
48-3-302. Request for preplacement assessment.

Part 6. Consent to Adoption.

48-3-601. Persons whose consent to adoption is required.
48-3-602. Consent of incompetent parents.
48-3-603. Persons whose consent is not required.
48-3-608. Revocation of consent.

Part 7. Relinquishment of Minor for Adoption.

48-3-702. Procedures for relinquishment.
48-3-704. Content of relinquishment; optional provisions.
48-3-705. Consequences of relinquishment.
48-3-706. Revocation of relinquishments.
48-3-707. Challenges to validity of relinquishments.

Article 4.

Adoption of a Minor Stepchild by Stepparent.

48-4-102. Consent to adoption of stepchild.
48-4-104. [Repealed.]

Article 9.

Confidentiality of Records and Disclosure of Information.

48-9-102. Records confidential and sealed.
48-9-107. New birth certificates.

ARTICLE 1.

General Provisions.

§ 48-1-100. Legislative findings and intent; construction of Chapter.

Editor's Note. — Session Laws 1995, c. 457, effective July 1, 1996, enacts a new Chapter 48 to replace former Chapter 48, derived from Session Laws 1949, c. 300, which it replaces.

Session Laws 1995, c. 457, s. 11, provides: "Nothing in this act shall affect the validity of an adoption completed or validated under any prior law."

Session Laws 1995, c. 457, s. 12, provides that this Article is effective July 1, 1996, and that any petition for adoption filed prior to and still pending on that date shall be completed in accordance with the law in effect immediately prior to that date.

Legal Periodicals. —

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

§ 48-1-101. Definitions.

In this Chapter, the following definitions apply:

(1) "Adoptee" means an individual who is adopted, is placed for adoption, or is the subject of a petition for adoption properly filed with the court.

(2) "Adoption" means the creation by law of the relationship of parent and child between two individuals.

(3) "Adult" means an individual who has attained 18 years of age, or if under the age of 18, is either married or has been emancipated under the applicable State law.

(3a) "Adoption facilitator" means an individual or a nonprofit entity that assists biological parents in locating and evaluating prospective adoptive parents without charge.

(4) "Agency" means a public or private association, corporation, institution, or other person or entity that is licensed or otherwise authorized by the law of the jurisdiction where it operates to place minors for adoption. "Agency" also means a county department of social services in this State.

(5) "Child" means a son or daughter, whether by birth or adoption.

(6) "Department" means the North Carolina Department of Health and Human Services.

(7) "Division" means the Division of Social Services of the Department.

(8) "Guardian" means an individual, other than a parent, appointed by a clerk of court in North Carolina to exercise all of the powers conferred by G.S. 35A-1241, including a standby guardian appointed under Article 21 of Chapter 35A of the General Statutes whose authority has actually commenced; and also means an individual, other than a parent, appointed in another jurisdiction according to the law of that jurisdiction who has the power to consent to adoption under the law of that jurisdiction.

(9) "Legal custody" of an individual means the general right to exercise continuing care of and control over the individual as authorized by law, with or without a court order, and:

a. Includes the right and the duty to protect, care for, educate, and discipline the individual;

b. Includes the right and the duty to provide the individual with food, shelter, clothing, and medical care; and
c. May include the right to have physical custody of the individual.

(10) "Minor" means an individual under 18 years of age who is not an adult.

(11) "Party" means a petitioner, adoptee, or any person whose consent to an adoption is necessary under this Chapter but has not been obtained.

(12) "Physical custody" means the physical care of and control over an individual.

(13) "Placement" means transfer of physical custody of a minor to the selected prospective adoptive parent. Placement may be either:
a. Direct placement by a parent or the guardian of the minor; or
b. Placement by an agency.

(14) "Preplacement assessment" means a document, whether prepared before or after placement, that contains the information required by G.S. 48-3-303 and any rules adopted by the Social Services Commission.

(15) "Relinquishment" means the voluntary surrender of a minor to an agency for the purpose of adoption.

(16) "Report to the court" means a document prepared in accordance with G.S. 48-2-501, et seq.

(17) "State" means a state as defined in G.S. 12-3(11).

(18) "Stepparent" means an individual who is the spouse of a parent of a child, but who is not a legal parent of the child. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1; 1981, c. 924, s. 1; 1985, c. 758, s. 4; 1995, c. 457, s. 2; 1997-215, s. 11(e); 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-215, s. 11(e), effective June 19, 1997, inserted "including a standby guardian appointed under Article 21 of Chapter 35A of the General Statutes whose authority has actually commenced" in subdivision (8).

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 48-1-106. Legal effect of decree of adoption.

CASE NOTES

I. In General.

I. IN GENERAL.

Editor's Note. *— The opinions below were decided prior to the 1995 revision of Chapter 48.*

Adoption Terminates Rights of Natural Parents. —

A natural parent who has consented to the adoption of his or her children cannot thereafter bring an action against the natural parent and adoptive parent for custody or visitation of the children. Kelly v. Blackwell, 121 N.C. App. 621, 468 S.E.2d 400 (1996).

Equitable Adoption Not Recog-

nized. — Although plaintiff was raised by a couple, given their surname, and held out to the community as their child, but not adopted in accordance with the statutes, plaintiff could not be treated as their adopted daughter as North Carolina does not recognize equitable adoption. Lankford v. Wright, 122 N.C. App. 746, 472 S.E.2d 31 (1996).

ARTICLE 2.

General Adoption Procedure.

Part 1. Jurisdiction and Venue.

§ 48-2-100. Jurisdiction.

CASE NOTES

Editor's Note. — *Many of the opinions below were decided prior to the 1995 revision of Chapter 48.*

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, — N.C. App. —, 454 S.E.2d 693 (1995).

Simultaneous Adoption and Custody Actions. — Because the legislature has enunciated a public policy that every child should have a permanent plan of care, thus because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

In the absence an order of consolidation when the same child is the subject of a simultaneous custody and adoption proceeding, both the superior and district courts do not have continuing jurisdiction to fully adjudicate the respective issues before them. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care for the child and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding, therefore, upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, — N.C. App. —, 454 S.E.2d 693 (1995).

When legal and physical custody of minor child vested in the Department of Social Services (DSS), it was then authorized to proceed in its discretion with placing child for adoption, and the trial court had no authority to interfere with the DSS's placement decision. In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1996).

§ 48-2-102. Transfer, stay, or dismissal.

Legal Periodicals. — For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

Part 2. General Procedural Provisions.

§ 48-2-206. Prebirth determination of right to consent.

(a) Anytime after six months from the date of conception as reasonably determined by a physician, the biological mother, agency, or adoptive parents chosen by the biological mother may file a special proceeding with the clerk requesting the court to determine whether consent of the biological father is required. The biological father shall be served with notice of the intent of the biological mother to place the child for adoption, allowing the biological father 15 days after service to assert a claim that his consent is required.

(b) The notice required under subsection (a) of this section shall contain the special proceeding case caption and file number and shall be substantially similar to the following language:

> "[Name of the biological mother], the biological mother, is expected to give birth to a child on or about [birth due date]. You have been identified as the biological father. It is the intention of the biological mother to place the child for adoption. It is her belief that your consent to the adoption is not required. If you believe your consent to the adoption of this child is required pursuant to G.S. 48-3-601, you must notify the court in writing no later than 15 days from the date you received this notice that you believe your consent is required. A copy of your notice to the court must also be sent to the person or agency that sent you this notice. If you fail to notify the court within 15 days that you believe your consent is required, the court will rule that your consent is not required."

(c) If the biological father fails to respond within the time required, the court shall enter an order that the biological father's consent is not required for the adoption. A biological father who fails to respond within the time required under this section is not entitled to notice under G.S. 48-2-401(c) of an adoption petition filed within three months of the birth of the minor.

(d) If the biological father notifies the court within 15 days of his receipt of the notice required by subsection (a) of this section that he believes his consent to the adoption is required, on motion of the petitioner, the court shall hold a hearing to determine whether the consent of the biological father is required. Promptly on receipt of the petitioner's motion, the court shall set a date for the hearing no earlier than 60 days nor later than 70 days after the biological father received the notice required by subsection (a) of this section and shall notify the petitioner and the biological father of the date, time, and place of the hearing. The notice of hearing to the biological father shall include a statement substantially similar to the following:

> "To the biological father named above: You have told the court that you believe your consent is necessary for the adoption of the child described in the notice sent to you earlier. This hearing

> is being held to decide whether your consent is in fact necessary. Before the date of the hearing, you must have taken steps under G.S. 48-3-601 to establish that your consent is necessary or this court will decide that your consent is not necessary and the child can be adopted without it."

During the hearing, the court may take such evidence as necessary and enter an order determining whether or not the consent of the biological father is necessary.

(e) The manner of service under this section shall be the same as set forth in G.S. 48-2-402.

(f) The jurisdiction provisions of Article 6A of Chapter 1 of the General Statutes and the venue provisions of Article 7 of Chapter 1 of the General Statutes rather than the provisions of Part 1 of this Article apply to proceedings under this section.

(g) Computation of periods of time provided for in this section shall be calculated as set forth in G.S. 1A-1, Rule 6.

(h) Transfer under G.S. 1-272 and appeal under G.S. 1-279.1 shall be as for an adoption proceeding.

(i) A determination by the court under this section that the consent of the biological father is not required shall only apply to an adoption petition filed within three months of the birth of the minor. (1997-215, s. 14.)

Editor's Note. — Session Laws 1997-215, s. 20, made this section effective October 1, 1997.

Part 3. Petition for Adoption.

§ 48-2-303. Caption of petition for adoption.

The caption of the petition shall be substantially as follows:

STATE OF NORTH CAROLINA
IN THE DISTRICT COURT
.... COUNTY
BEFORE THE CLERK

....
*(Full name of petitioning father)
and
....
*(Full name of petitioning mother)
and
FOR THE ADOPTION OF
....

PETITION FOR ADOPTION

*(Full name by which the adoptee is to be known if the adoption is granted). (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1995, c. 88, s. 5; c. 457, s. 2; 1997-215, s. 9(d).)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted "by which the adoptee is to be known if the adoption is granted)" for "of adoptee as used in proceeding)" following "(Full name" at the end of the form.

§ 48-2-305. Petition for adoption; additional documents.

At the time the petition is filed, the petitioner shall file or cause to be filed the following documents:

(1) Any required affidavit of parentage executed pursuant to G.S. 48-3-206;

(2) Any required consent or relinquishment that has been executed;

(3) A certified copy of any court order terminating the rights and duties of a parent or a guardian of the adoptee;

(4) A certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee;

(5) A copy of any required preplacement assessment certified by the agency that prepared it or an affidavit from the petitioner stating why the assessment is not available;

(6) A copy of any document containing the information required under G.S. 48-3-205 concerning the health, social, educational, and genetic history of the adoptee and the adoptee's original family which the petitioner received before the placement or at any later time, certified by the person who prepared it, or if this document is not available, an affidavit stating the reason why it is not available;

(7) Any signed copy of the form required by the Interstate Compact on the Placement of Children, G.S. 110-57.1, et seq., authorizing a minor to come into this State;

(8) A writing that states the name of any individual whose consent is or may be required, but who has not executed a consent or a relinquishment or whose parental rights have not been legally terminated, and any fact or circumstance that may excuse the lack of consent or relinquishment; and

(9) In an adoption pursuant to Article 4 of this Chapter, a copy of any agreement to release past-due child support payments.

The petitioner may also file any other document necessary or helpful to the court's determination. (1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11; 1995, c. 457, s. 2; 1997-215, s. 1.)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, at the beginning of subdivision (6) deleted "certified" after "A", and inserted "certified by the person who prepared it."

Part 4. Notice of Pendency of Proceedings.

§ 48-2-401. Notice by petitioner.

(a) No later than 30 days after a petition for adoption is filed pursuant to Part 3 of this Article, the petitioner shall serve notice of the filing on the persons required to receive notice under subsections (b), (c), and (d) of this section.

(b) In all adoptions, the petitioner shall serve notice of the filing on:

(1) Any individual whose consent to the adoption is required but has not been obtained, has been revoked in accord with

this Chapter, or has become void as provided in this Chapter;

(2) The spouse of the petitioner if that spouse is required to join in the petition and petitioner is requesting that the joinder requirement be waived;

(3) Any individual who has executed a consent or relinquishment, but who the petitioner has actually been informed has filed an action to set it aside for fraud or duress; and

(4) Any other person designated by the court who can provide information relevant to the proposed adoption.

(c) In the adoption of a minor, the petitioner shall also serve notice of the filing on:

(1) A minor whose consent is dispensed with under G.S. 48-3-603(b)(2);

(2) Any agency that placed the adoptee;

(3) A man who to the actual knowledge of the petitioner claims to be or is named as the biological or possible biological father of the minor, and any biological or possible biological fathers who are unknown or whose whereabouts are unknown, but notice need not be served upon a man who has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the minor, or a man whose parental rights have been legally terminated or who has been judicially determined not to be the minor's parent; and

(4) Any individual who the petitioner has been actually informed has legal or physical custody of the minor or who has a right of visitation or communication with the minor under an existing court order issued by a court in this State or another state.

(d) In the adoption of an adult, the petitioner shall also serve notice of the filing on any adult children of the prospective adoptive parent and any parent, spouse, or adult child of the adoptee who are listed in the petition to adopt.

(e) Only those persons identified in subsections (b), (c), and (d) of this section are entitled to notice of the proceeding.

(f) A notice required under this section must state that the person served must file a response to the petition within 30 days after service in order to participate in and to receive further notice of the proceeding, including notice of the time and place of any hearing. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13; 1973, c. 1354, s. 5; 1983, c. 30; c. 454, ss. 2, 6; 1995, c. 457, s. 2; 1997-215, s. 2.)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, twice inserted "adult" in subsection (d).

§ 48-2-403. Notice of proceedings by clerk.

No later than five days after a petition is filed, the clerk of the court shall mail or otherwise deliver notice of the adoption proceeding to any agency that has undertaken but not yet completed a preplacement assessment and any agency ordered to make a report to the court pursuant to Part 5 of this Article. (1995, c. 457, s. 2; 1997-215, s. 3.)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, substituted "mail or otherwise deliver notice of the adoption proceeding" for "give notice of the adoption proceeding by certified mail, return receipt requested."

Part 5. Report to the Court.

§ 48-2-501. Report to the court during proceeding for adoption of a minor.

(a) Whenever a petition for adoption of a minor is filed, the court shall order a report to the court made to assist the court to determine if the proposed adoption of the minor by the petitioner is in the minor's best interest.

(b) Consistent with G.S. 48-1-109, the court shall order the report to be prepared:

(1) By the agency that placed the minor;

(2) By the agency that made the preplacement assessment pursuant to Part 3 of Article 3 of this Chapter; or

(3) By another agency.

(c) The court shall provide the individual who prepares the report with copies of:

(1) The petition to adopt; and

(2) The documents filed with it.

(d) As an exception to this section, in any stepparent adoption under Article 4 of this Chapter in which the minor has lived with the stepparent for at least the two consecutive years immediately preceding the filing of the petition, the court may order a report, but it is not required to order a report unless the minor's consent is to be waived, the minor has revoked a consent, or both of the minor's parents are dead. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1997-215, s. 12(a).)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, at the end of the introductory language of subsection (c) deleted "(i) the petition to adopt; and (ii) the documents filed with it"; and added subdivisions (c)(1), (c)(2) and subsection (d).

§ 48-2-502. Preparation and content of report.

(a) In preparing a report to the court, the agency shall conduct a personal interview with each petitioner in the petitioner's residence and at least one additional interview with each petitioner and the adoptee, and shall observe the relationship between the adoptee and the petitioner or petitioners.

(b) The report must be in writing and contain:

(1) An account of the petitioner's marital or family status, physical and mental health, home environment, property, income, and financial obligations; if there has been a preplacement assessment, the account may be limited to any changes since the filing of the preplacement assessment;

(2) All reasonably available nonidentifying information concerning the physical, mental, and emotional condition of

the adoptee required by G.S. 48-3-205 which is not already included in the document prepared under that section;

(3) Copies of any court order, judgment, decree, or pending legal proceeding affecting the adoptee, the petitioner, or any child of the petitioner relevant to the welfare of the adoptee;

(4) A list of the expenses, fees, or other charges incurred, paid, or to be paid in connection with the adoption that can reasonably be ascertained by the agency;

(5) Any fact or circumstance known to the agency that raises a specific concern about whether the proposed adoption is contrary to the best interest of the adoptee because it poses a significant risk of harm to the well-being of the adoptee;

(6) A finding by the agency concerning the suitability of the petitioner and the petitioner's home for the adoptee;

(7) A recommendation concerning the granting of the petition; and

(8) Such other information as may be required by rules adopted pursuant to subsection (c) of this section.

In an agency adoption, the report shall be written in such a way as to exclude all information that could reasonably be expected to lead directly to the identity of the adoptee at birth or any former parent or family member of the adoptee, and any copies of documents included pursuant to subdivision (3) of this subsection shall be redacted to exclude this information.

(c) The Social Services Commission may adopt rules to implement the provisions of this section. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1997-215, s. 4.)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, added the last sentence of subsection (b).

§ 48-2-503. Timing and filing of report.

(a) The agency shall complete a written report and file it with the court within 60 days after the mailing or delivery of the order under G.S. 48-2-501 unless the court extends the time for filing. The agency shall have three additional days to complete and file the report if the order was mailed.

(b) If the agency identifies a specific concern about the suitability of the petitioner or the petitioner's home for the adoptee, the agency must file an interim report immediately, which must contain an account of the specific concern. The agency shall indicate in the final report whether its concerns have been satisfied and in what manner.

(b1) When an agency identifies a specific concern in a final report and the court extends the time for a final hearing or disposition to allow resolution of these concerns, the agency shall file a supplemental report indicating whether its concerns have been satisfied and in what manner.

(c) The agency shall give the petitioner a copy of each report filed with the court, and the agency shall retain a copy. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1997-215, s. 5(a)-(c).)

Editor's Note. — Session Laws 1997-215, s. 5(d), provides that s. 5(a) of that act, amending subsection (a) of this section, applies to reports to the court prepared in response to a notice under G.S. 48-2-403 mailed or delivered after the effective date of that act. The effective date of s. 5 was June 19, 1997.

Effect of Amendments. — Session Laws 1997-215, ss. 5(a) through (c), effective June 19, 1997, in subsection (a) substituted "the mailing or delivery" for "receipt" in the first sentence and added the last sentence; in subsection (b) added the last sentence; and added subsection (b1).

Part 6. Dispositional Hearing; Decree of Adoption.

§ 48-2-601. Hearing on, or disposition of, adoption petition; timing.

(a) If it appears to the court that a petition to adopt a minor is not contested, the court may dispose of the petition without a formal hearing.

(b) No later than 90 days after a petition for adoption has been filed, the court shall set a date and time for hearing or disposing of the petition.

(c) The hearing or disposition must take place no later than six months after the petition is filed, but the court for cause may extend the time for the hearing or disposition. (1949, c. 300; 1953, c. 571; 1959, cc. 340, 561; 1961, cc. 186, 384; 1967, c. 19; c. 619, s. 4; 1969, c. 982; 1973, c. 1354, s. 6; 1989 (Reg. Sess., 1990), c. 977, s. 1; 1995, c. 457, s. 2; 1997-215, s. 10(a).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to petitions filed on or after the effective date, substituted "a petition to adopt a minor" for "the petition" in subsection (a).

§ 48-2-604. Denying petition to adopt a minor.

(a) If at any time between the filing of a petition to adopt a minor and the issuance of the final order completing the adoption it appears to the court that the minor should not be adopted by the petitioners or the petition should be dismissed for some other reason, the court may dismiss the proceeding.

(b) The court, before entering an order to dismiss the proceeding, shall give at least five days" notice of the motion to dismiss to the parties, to the agency that made the report to the court, and to the Department of Health and Human Services. The parties and agency entitled to notice under this subsection, and the Department, shall be entitled to a hearing on the issue of dismissing the proceeding.

(c) If the court denies the petition, the custody of the minor shall revert to any agency or person having custody immediately before the filing of the petition. If the placement of the minor was a direct placement under Article 3 of this Chapter, the court shall notify the director of social services of the county in which the petition was filed of the dismissal, and the director of social services shall be responsible for taking appropriate action for the protection of the minor. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 6.; 1995, c. 457, s. 2; 1997-215, s. 6(a); 1997-443, s. 11A.118(b).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-215, s. 6(a), effective October 1, 1997, added subsections (a) and (b); added the subsection (c) designation; and in subsection (c) substituted "the petition" for "a petition to adopt a minor" in the first sentence, and in the last sentence twice substituted "minor" for "child", and inserted "of this Chapter" following "Article 3".

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

ARTICLE 3.

Adoption of Minors.

Part 2. Placement of Minors for Adoption.

§ 48-3-201. Who may place minors for adoption.

(a) Only the following may place the minor for adoption:
- (1) An agency,
- (2) A guardian,
- (3) Both parents acting jointly, if
  - a. Both parents are married to each other and living together, or
  - b. One parent has legal custody of a minor and the other has physical custody but neither has both, or
- (4) A parent with legal and physical custody of a minor, except as provided in subdivision (3) of this subsection.

(b) A parent, guardian, or agency that places a minor directly for adoption shall execute a consent to the minor's adoption pursuant to Part 6 of this Article.

(c) A parent or guardian of a minor who wants an agency to place the minor for adoption must execute a relinquishment to the agency pursuant to Part 7 of this Article before the agency can place the minor.

(d) An agency having legal and physical custody of a minor may place the minor for adoption at any time after a relinquishment is executed by anyone as permitted by G.S. 48-3-701. The agency may place the minor for adoption even if other consents are required before an adoption can be granted, unless an individual whose consent is required notifies the agency in writing of the individual's objections before the placement. The agency shall act promptly after accepting a relinquishment to obtain all other necessary consents, relinquishments, or terminations of any guardian's authority pursuant to Chapter 35A of the General Statutes or parental rights pursuant to Article 24B of Chapter 7A of the General Statutes. (1995, c. 457, s. 2; 1997-215, s. 11(b).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, rewrote subsection (d).

Part 3. Preplacement Assessment.

§ 48-3-301. Preplacement assessment required.

(a) Except as provided in subsection (b) of this section, placement of a minor may occur only if a written preplacement assessment:

(1) Has been completed or updated within the 18 months immediately preceding the placement; and

(2) Contains a finding that the individual who is the subject of the assessment is suitable to be an adoptive parent, either in general or for a specific minor.

(b) A preplacement assessment is not required when a parent or guardian places a minor directly with a grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, or great-grandparent of the minor.

(c) If a direct placement is made in violation of this section:

(1) The prospective adoptive parent shall request any preplacement assessment already commenced to be expedited, and if none has been commenced, shall obtain a preplacement assessment from an agency as authorized by G.S. 48-1-109; in either case, the assessment shall include the fact and date of placement;

(2) The court may not enter a decree of adoption until both a favorable preplacement assessment and a report to the court have been completed and filed, and the court may not order a report to the court for at least 30 days after the preplacement assessment has been completed; and

(3) If the person who placed the minor executes a consent before receiving a copy of the preplacement assessment, G.S. 48-3-608 shall determine the time within which that person may revoke. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1; 1993, c. 539, s. 410; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 1997-215, s. 19(a).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to placements made on or after the effective date of the act, substituted "18" for "12" preceding "months" in subdivision (a)(1).

§ 48-3-302. Request for preplacement assessment.

(a) An individual seeking to adopt may request a preplacement assessment at any time by an agency authorized by G.S. 48-1-109 to prepare preplacement assessments.

(b) An individual requesting a preplacement assessment need not have located a prospective adoptee when the request is made.

(c) An individual may have more than one preplacement assessment or may request that an assessment, once initiated, not be completed.

(d) If an individual is seeking to adopt a minor from a particular agency, the agency may require the individual to be assessed by its own employee, even if the individual has already had a favorable preplacement assessment completed by another agency.

(e) If an individual requesting a preplacement assessment has identified a prospective adoptive child and has otherwise been unable to obtain a preplacement assessment, the county department of social services must, upon request, prepare or contract for the preparation of the preplacement assessment. As used in this subsection, "unable to obtain a preplacement assessment" includes the inability to obtain a preplacement assessment at the fee the county department of social services is permitted to charge the individual. Except as provided in this subsection, no agency is required to conduct a preplacement assessment unless it agrees to do so. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1; 1993, c. 539, s. 410; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 1997-215, s. 15.)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, added the next to last sentence in subsection (e).

Part 6. Consent to Adoption.

§ 48-3-601. Persons whose consent to adoption is required.

Unless consent is not required under G.S. 48-3-603, a petition to adopt a minor may be granted only if consent to the adoption has been executed by:

(1) The minor to be adopted if 12 or more years of age;
(2) In a direct placement, by:
  a. The mother of the minor;
  b. Any man who may or may not be the biological father of the minor but who:
    1. Is or was married to the mother of the minor if the minor was born during the marriage or within 280 days after the marriage is terminated or the parties have separated pursuant to a written separation agreement or an order of separation entered under Chapters 50 or 50B of the General Statutes or a similar order of separation entered by a court in another jurisdiction;
    2. Attempted to marry the mother of the minor before the minor's birth, by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the minor is born during the attempted marriage, or within 280 days after the attempted marriage is terminated by annulment, declaration of invalidity, divorce, or, in the absence of a judicial proceeding, by the cessation of cohabitation;
    3. Before the filing of the petition, has legitimated the minor under the law of any state;
    4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
      I. Is obligated to support the minor under written agreement or by court order;
      II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the

payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both; or

III. After the minor's birth but before the minor's placement for adoption or the mother's relinquishment, has married or attempted to marry the mother of the minor by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or

5. Before the filing of the petition, has received the minor into his home and openly held out the minor as his biological child; or
6. Is the adoptive father of the minor; and

c. A guardian of the minor; and

(3) In an agency placement by:

a. The agency that placed the minor for adoption; and
b. Each individual described in subdivision (2) of this section who has not relinquished the minor pursuant to Part 7 of Article 3 of this Chapter. (1949, c. 300; 1953, c. 906; 1957, c. 90; c. 778, ss. 3-5; 1961, c. 186; 1969, c. 534, s.1; c. 911, ss. 6, 7; c. 982; 1971, c. 1093, s. 13; c. 1185, s. 17; 1973, c. 1354, s. 5; 1975, c. 321, s. 1; c. 702, ss. 1-3; c. 714; 1977, c. 879, ss. 2, 3, 5; 1979, c. 107, s. 7; 2nd Sess., c. 1088, s. 1; 1983, cc. 30, 292; c. 454, ss. 2, 6; 1985, c. 758, ss. 5-11; 1987, c. 371, s. 1; 1995, c. 457, s. 2; 1997-215, s. 16.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, in subdivision (2)b.4. inserted "earlier of the" following "Before the" at the beginning, and inserted "or the date of a hearing under G.S. 48-2-206."

§ 48-3-602. Consent of incompetent parents.

If a parent as described in G.S. 48-3-601 has been adjudicated incompetent, then the court shall appoint a guardian ad litem for that parent and, unless the child already has a guardian, a guardian ad litem for the child to make a full investigation as to whether the adoption should proceed. The investigation shall include an evaluation of the parent's current condition and any reasonable likelihood that the parent will be restored to competency, the relationship between the child and the incompetent parent, alternatives to adoption, and any other relevant fact or circumstance. If the court determines after a hearing on the matter that it will be in the best interest of the child for the adoption to proceed, the court shall order the guardian ad litem of the parent to execute a consent for that parent. (1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11; 1995, c. 457, s. 2; 1997-215, s. 11(d).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, substituted "and, unless the child already has a guardian" for "and" following "for that parent" in the first sentence.

§ 48-3-603. Persons whose consent is not required.

(a) Consent to an adoption of a minor is not required of a person or entity whose consent is not required under G.S. 48-3-601, or:

(1) An individual whose parental rights and duties have been terminated under Article 24B of Chapter 7A of the General Statutes or by a court of competent jurisdiction in another state;

(2) A man described in G.S. 48-3-601(2), other than an adoptive father, if (i) the man has been judicially determined not to be the father of the minor to be adopted, or (ii) another man has been judicially determined to be the father of the minor to be adopted;

(3) Repealed by Session Laws 1997-215, s. 11(a), effective June 19, 1997.

(4) An individual who has relinquished parental rights or guardianship powers, including the right to consent to adoption, to an agency pursuant to Part 7 of this Article;

(5) A man who is not married to the minor's birth mother and who, after the conception of the minor, has executed a notarized statement denying paternity or disclaiming any interest in the minor;

(6) A deceased parent or the personal representative of a deceased parent's estate; or

(7) An individual listed in G.S. 48-3-601 who has not executed a consent or a relinquishment and who fails to respond to a notice of the adoption proceeding within 30 days after the service of the notice.

(8) An individual notified under G.S. 48-2-206 who does not respond in a timely manner or whose consent is not required as determined by the court.

(b) The court may issue an order dispensing with the consent of:

(1) A guardian or an agency that placed the minor upon a finding that the consent is being withheld contrary to the best interest of the minor; or

(2) A minor 12 or more years of age upon a finding that it is not in the best interest of the minor to require the consent. (1949, c. 300; 1957, c. 90; c. 778, ss. 3, 4; 1969, c. 534, s. 1; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; c. 714; 1977, c. 879, ss. 2, 3; 1979, c. 107, s. 7; 2nd Sess., c. 1088, s. 1; 1983, c. 292; 1985, c. 758, ss. 5-9; 1987, c. 371, s. 1; 1995, c. 457, s. 2; 1997-215, ss. 11(a), 17.)

Effect of Amendments. — Session Laws 1997-215, s. 11(a), effective June 19, 1997, deleted subdivision (a)(3), which read "A parent for whose minor child a guardian has been appointed."

Session Laws 1997-215, s. 17, effective October 1, 1997, added subdivision (a)(8).

§ 48-3-608. Revocation of consent.

(a) A consent to the adoption of an infant who is in utero or is three months old or less at the time the consent is given may be revoked within 21 days following the day on which it is executed, inclusive of weekends and holidays. A consent to the adoption of any other minor may be revoked within seven days following the day on which it is executed, inclusive of weekends and holidays. If the final day of the revocation period falls on a weekend or North Carolina or federal holiday, then the revocation period extends to the next business day. The individual who gave the consent may revoke by giving written notice to the person specified in the consent. Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested. If notice is given by mail, notice is deemed complete when it is deposited in the United States mail, postage prepaid, addressed to the person to whom consent was given at the address specified in the consent. If notice is given by overnight delivery service, notice is deemed complete on the date it is deposited with the service as shown by the receipt from the service, with delivery charges paid by the sender, addressed to the person to whom consent was given at the address specified in the consent.

(b) In a direct placement, if:

(1) A preplacement assessment is required, and

(2) Placement occurs before the preplacement assessment is given to the parent or guardian who is placing the minor,

then that individual's time under subsection (a) of this section to revoke any consent previously given shall be either five business days after the date the individual receives the preplacement assessment or the remainder of the time provided in subsection (a) of this section, whichever is longer. The date of receipt is the earlier of the date of actual receipt or the date established pursuant to G.S. 48-3-307.

(c) If a person who has physical custody places the minor with the prospective adoptive parent and thereafter revokes a consent pursuant to this section, the prospective adoptive parent shall, immediately upon request, return the minor to that person. The revocation restores the right to physical custody and any right to legal custody to the person who placed the minor and divests the prospective adoptive parent of any right to legal or physical custody and any further responsibility for the care and support of the minor. In any subsequent proceeding, the court shall award reasonable attorneys' fees to the person who revoked if the prospective adoptive parent fails upon request to return the minor.

(d) If a person other than a person described in subsection (c) of this section revokes a consent pursuant to this section and this person's consent is required, the adoption cannot proceed until another consent is obtained or the person's parental rights are terminated. The person who revoked consent is not thereby entitled to physical custody of the minor. If the minor whose consent is required revokes consent, the county department of social services shall be notified for appropriate action.

(e) A second consent to adoption by the same adoptive parents is irrevocable. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2; 1997-215, s. 8(a).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to notices given on or after the effective date of the act, added the last sentence in subsection (a).

Part 7. Relinquishment of Minor for Adoption.

§ 48-3-702. Procedures for relinquishment.

(a) A relinquishment executed by a parent or guardian must conform substantially to the requirements in this Part and must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments.

(b) The provisions of G.S. 48-3-605(b), (c), (e), and (f), also apply to a relinquishment executed under this Part.

(c) An agency that accepts a relinquishment shall furnish each parent or guardian who signs the relinquishment a letter or other writing indicating the agency's willingness to accept that person's relinquishment. (1995, c. 457, s. 2; 1997-215, s. 7(a).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to relinquishments executed on or after the effective date of the act, at the end of subsection (b) deleted "except that an individual before whom a relinquishment is signed and acknowledged shall also certify that an employee of the agency to which the minor is being relinquished signed a statement indicating the agency's willingness to accept the relinquishment"; and added subsection (c).

§ 48-3-704. Content of relinquishment; optional provisions.

In addition to the mandatory provisions listed in G.S. 48-3-703, a relinquishment may also state that the relinquishment may be revoked upon notice by the agency that an adoption by a specific prospective adoptive parent, named or described in the relinquishment is not completed. (1995, c. 457, s. 2; 1997-215, s. 19.1(a).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to relinquishments executed on or after August 1, 1997, deleted "or if the agency and the person relinquishing the minor mutually agreed to rescind the relinquishment before placement with prospective adoptive parent occurs" at the end of the section.

§ 48-3-705. Consequences of relinquishment.

(a) A relinquishment executed pursuant to G.S. 48-3-702 through G.S. 48-3-704 may be revoked as provided in G.S. 48-3-706 and is otherwise final and irrevocable except under a circumstance set forth in G.S. 48-3-707.

(b) Upon execution, a relinquishment by a parent or guardian entitled under G.S. 48-3-201 to place a minor for adoption:

(1) Vests legal and physical custody of the minor in the agency; and

(2) Empowers the agency to place the minor for adoption with a prospective adoptive parent selected in the manner specified in the relinquishment.

(c) A relinquishment terminates:

(1) Any right and duty of the individual who executed the relinquishment with respect to the legal and physical custody of the minor.

(2) The right to consent to the minor's adoption.

(3) Repealed by Session Laws 1997-215, s. 19.1(b), effective August 1, 1997.

(d) Except as provided in subsection (c) of this section, parental rights and duties of a parent who executed a relinquishment are not terminated until the decree of adoption becomes final or the parental relationship is otherwise legally terminated, whichever occurs first. Until termination the minor remains the child of a parent who executed a relinquishment for purposes of any inheritance, succession, insurance, arrears of child support, and other benefit or claim that the minor may have from, through, or against the parent. (1949, c. 300; 1953, c. 906; 1957, c. 778, s. 6; 1961, c. 186; 1967, c. 926, s. 1; 1969, c. 911, ss. 7, 9; c. 982; 1973, c. 476, s. 138; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1983, c. 454, ss. 4, 7; cc. 83, 688; 1985, c. 758, ss. 10-12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2; 1997-215, s. 19.1(b).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to relinquishments executed on or after August 1, 1997, deleted subdivision (c)(3), which read "The duty to support the minor", and made related changes.

CASE NOTES

When legal and physical custody of minor child vested in the Department of Social Services (DSS), it was then authorized to proceed in its discretion with placing child for adoption, and the trial court had no authority to interfere with the DSS's placement decision. In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1996).

§ 48-3-706. Revocation of relinquishments.

(a) A relinquishment of an infant who is in utero or is three months old or less at the time the relinquishment is executed may be revoked within 21 days following the day on which it is executed, inclusive of weekends and holidays. A relinquishment of any other minor may be revoked within seven days following the day on which it is executed, inclusive of weekends and holidays. If the final day of the period falls on a weekend or a North Carolina or federal holiday, then the revocation period extends to the next business day. The individual who gave the relinquishment may revoke by giving written notice to the agency to which the relinquishment was given. Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested. If notice is given by mail, notice is deemed complete when it is deposited in the United States mail, postage prepaid, addressed to the agency at the agency's address as given in the relinquishment. If notice is given by overnight delivery service, notice is deemed complete on the date it is deposited with the service as shown by the receipt from the service, with delivery charges paid by the sender, addressed to the agency at the agency's address as given in the relinquishment.

(b) If a person who has physical custody relinquishes a minor and thereafter revokes a relinquishment pursuant to this section, the agency shall upon request return the minor to that person. The revocation restores the right to physical custody and any right to legal custody to the person who relinquished the minor and divests the agency of any right to legal or physical custody and any further responsibility for the care and support of the minor. In any subsequent proceeding, the court may award the person who revoked reasonable attorneys' fees from a prospective adoptive parent with whom the minor was placed who refuses to return the minor and from the agency if the agency fails to cooperate in securing the minor's return.

(c) If a person other than a person described in subsection (b) of this section revokes a relinquishment pursuant to this section and this person's consent is required, the agency may not give consent for the adoption and the adoption cannot proceed until another relinquishment or a consent is obtained or parental rights are terminated. The person who revoked the relinquishment is not thereby entitled to physical custody of the minor.

(d) A second relinquishment for placement with the same adoptive parent selected by the agency and agreed upon by the person executing the relinquishment, or a second general relinquishment for placement by the agency with any adoptive parent selected by the agency, is irrevocable. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2; 1997-456, s. 56.2(a).)

Editor's Note. — Session Laws 1997-456, s. 56.2(b), effective August 29, 1997, provided the 1997 amendment to this section applied to notices given on or after August 29, 1997.

Effect of Amendments. — The 1997 amendment, effective August 29, 1997, added the last sentence in subsection (a).

§ 48-3-707. Challenges to validity of relinquishments.

(a) A relinquishment shall become void if:

(1) Before the entry of the adoption decree, the individual who executed the relinquishment establishes by clear and convincing evidence that it was obtained by fraud or duress.

(2) Before placement with a prospective adoptive parent occurs, the agency and the person relinquishing the minor agree to rescind the relinquishment.

(b) A relinquishment may be revoked upon the happening of a condition expressly provided for in the relinquishment pursuant to G.S. 48-3-704.

(c) If the relinquishment of an individual who previously had legal and physical custody of a minor is set aside under subsection (a) or (b) of this section and no grounds exist under G.S. 48-3-603 for dispensing with this individual's consent, the court shall order the return of the minor to the custody of that individual, and shall dismiss any pending proceeding for adoption. If the court has reasonable cause to believe that the return will be detrimental to the minor, the court shall not order the return of the minor but shall notify the county department of social services for appropriate action.

(d) If the relinquishment of an individual who did not previously have physical custody of a minor is set aside under subsection (a) or (b) of this section, and no grounds exist under G.S. 48-3-603 for dispensing with this individual's consent, the court shall dismiss any pending proceeding for adoption. If return of the minor is not ordered under subsection (c) of this section, the court shall notify the county department of social services for appropriate action. (1995, c. 457, s. 2; 1997-215, s. 19.1(c).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, and applicable to relinquishments executed on or after August 1, 1997, added the subdivision (a)(1) designation; added subdivision (a)(2); and made stylistic changes.

Article 4.

Adoption of a Minor Stepchild by Stepparent.

§ 48-4-102. Consent to adoption of stepchild.

Except under circumstances described in G.S. 48-3-603, a petition to adopt a minor stepchild may be granted only if consent to the adoption has been executed by the adoptee if 12 or more years of age; and

(1) The adoptee's parents as described in G.S. 48-3-601; and
(2) Any guardian of the adoptee.

The consent of an incompetent parent may be given pursuant to the procedures in G.S. 48-3-602. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13; 1973, c. 1354, s. 5; 1983, c. 30; c. 454, ss. 2, 6; 1995, c. 457, s. 2; 1997-215, s. 11(c).)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, substituted "and" for "or" at the end of subdivision (1).

§ 48-4-104: Repealed by Session Laws 1997-215, s. 12(b), effective October 1, 1997.

Article 9.

Confidentiality of Records and Disclosure of Information.

§ 48-9-102. Records confidential and sealed.

(a) All records created or filed in connection with an adoption, except the decree of adoption and the entry in the special proceedings index in the office of the clerk of court, and on file with or in the possession of the court, an agency, the State, a county, an attorney, or other provider of professional services, are confidential and may not be disclosed or used except as provided in this Chapter.

(b) During a proceeding for adoption, records shall not be open to inspection by any person except upon an order of the court finding that disclosure is necessary to protect the interest of the adoptee.

(c) When a decree of adoption becomes final, all records and all indices of records on file with the court, an agency, or this State shall be retained permanently and sealed. Sealed records shall not be open to inspection by any person except as otherwise provided in this Article.

(d) Records must be sent by the clerk of superior court to the Division in the following order:

(1) Within 10 days after the petition is filed with the clerk of the superior court, a copy of the petition giving the date of the filing of the original petition and the original of each

consent and relinquishment must be filed by the clerk with the Division.

(2) Within 10 days after the decree of adoption is entered, the clerk must file with the Division the additional documents filed pursuant to G.S. 48-2-305, any report to the court, any additional documents submitted and orders entered, and a copy of the final order.

(e) The Division must cause the papers and reports related to the proceeding to be permanently indexed and filed.

(f) The Division shall transmit a report of each adoption and any name change to the State Registrar if the adoptee was born in this State. In the case of an adoptee who was not born in this State, the Division shall transmit the report and any name change to the appropriate official responsible for issuing birth certificates or their equivalent.

(g) In any adoption, the State Registrar may, in addition to receiving the report from the Division, request a copy of the final order and any separate order of name change directly from the clerk of court. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1967, c. 619, ss. 6, 7; c. 880, s. 3; 1969, c. 21, ss. 3-6; c. 982; 1971, c. 1231, s. 1; 1973, c. 476, s. 138; c. 849, s. 3; 1975, c. 91; 1979, c. 739, ss. 1, 2; 1981, c. 657; c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(4); 1993, c. 539, s. 411; c. 553, s. 14; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 1997-215, s. 9(a)-(c).)

Editor's Note. — Session Laws 1997-215, s. 9(e), provides: "Subsection (a) of this section [which made the insertion of subsection (a)] is effective on and after July 1, 1996. The remainder of this section becomes effective October 1, 1997. Subsections (b) and (c) [which amended subsections (f) and (g)] apply to final orders entered on or after the effective date of this act."

Effect of Amendments. — Session Laws 1997-215, ss. 9(a) through (c), in subsection (a) inserted "and the entry in the special proceedings index in the office of the clerk of court"; in subsection (f) substituted "each adoption" for "the adoption of a minor", substituted "adoptee" for "minor" preceding "was born", substituted the language beginning "State. In the case" and ending "any name change" for "State, or", and deleted "if the minor was not born in this State" at the end; and rewrote subsection (g). See editor's note for effective date.

§ 48-9-107. New birth certificates.

(a) Upon receipt of a report of the adoption of a minor from the Division, or the documents required by G.S. 48-9-102(g) from the clerk of superior court in the adoption of an adult, or a report of an adoption from another state, the State Registrar shall prepare a new birth certificate for the adoptee that shall contain the adoptee's full adoptive name, sex, state of birth, and date of birth; the full name of the adoptive father, if applicable; the full maiden name of the adoptive mother, if applicable; and any other pertinent information consistent with this section as may be determined by the State Registrar. The new certificate shall contain no reference to the adoption of the adoptee and shall not refer to the adoptive parents in any way other than as the adoptee's parents.

(b) In an adoption by a stepparent, the State Registrar shall prepare a new birth certificate pursuant to subsection (a) of this section except:

(1) The adoptive parent and the parent whose relation with the adoptee remains unchanged shall be listed as the adoptee's mother and father on the new birth certificate; and

(2) The city and county of birth of the adoptee shall be the same on the new birth certificate as on the original certificate.

The names of the adoptee's parents shall not be changed as provided in subdivision (1) of this subsection if the petitioner, the petitioner's spouse, the adoptee if age 12 or older, and any living parent whose parental rights are terminated by the adoption jointly file a request that the parents' names not be changed with the court prior to the entry of the adoption decree. The Division shall send a copy of this request with its report to the State Registrar or other appropriate official in the adoption of a minor stepchild, and the clerk of superior court shall send a copy with the documents required by G.S. 48-9-102(g) in the adoption of an adult stepchild.

(c) The State Registrar shall seal the original certificate of birth and all records in the possession of that office pertaining to the adoption. These records shall not be unsealed except as provided in this Article. The State Registrar shall provide certified typed copies or abstracts of the new certificate of birth of an adoptee prepared pursuant to subsection (a) of this section to the adoptee, the adoptee's children, the adoptive parents, and the adoptee's spouse, brothers, and sisters. For purposes of this subsection, "parent", "brother", and "sister" shall mean the adoptee's adoptive parent, brother, or sister and shall not mean a former parent, brother, or sister.

(d) At the time of preparing the new birth certificate pursuant to subsection (a) of this section, the State Registrar shall notify the register of deeds or appropriate official in the health department in the county of the adoptee's birth to remove the adoptee's birth certificate from the records and forward it to the State Registrar for retention under seal with the original certificate of birth in the State Registrar's office. The register of deeds shall also delete all index entries for that birth certificate. The State Registrar shall not issue copies of birth certificates for adoptees to registers of deeds. Only the State Registrar shall issue certified copies of such records, and these copies shall be prepared as prescribed in subsection (c) of this section.

(e) The State Registrar may by rule prescribe requirements for reports of adoptions from other states. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1; 1967, c. 880, s. 3; c. 1042, ss. 1-3; 1969, c. 21, s. 2-6; c. 977; 1971, c. 1231, s. 1; 1973, c. 476, s. 128; c. 849, ss. 1-3; 1975, c. 91; 1981, c. 657; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(3), (4); 1993, c. 553, s. 14; 1995, c. 457, s. 2; 1997-215, s. 18.)

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, inserted "the adoptee's children" following "section to the adoptee" in subsection (c).

ARTICLE 10.

Prohibited Practices in Connection With Adoption.

§ 48-10-102. Unlawful payments related to adoption.

CASE NOTES

***Editor's Note.** — The opinions below were decided prior to the 1995 revision of Chapter 48.*

Violation of Section. — Actions of adopting parents and their attorney in making funds available for the purpose of bringing a biological mother into the State so as to facilitate the adoption of her unborn child, including supporting her and the child through the date of birth and returning the mother to her home state, constituted a violation of this section. In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

Cancellation of Child Support Arrearages Against Public Policy. — Where the trial court concluded that mother was equitably estopped from collecting the child support arrearages and the sole basis for the estoppel was that the mother had promised she would "not pursue the action for child support arrears" in exchange for the father's consent to adoption, the agreement violated this section in that both the mother and the father gave and received consideration for the placement of the child for adoption. Thus the agreement was void as being contrary to the public policy and could not be used in equity to estop the mother from enforcing her judgment for the full amount of the child support arrearages. State ex rel. Raines v. Gilbert, 117 N.C. App. 129, 450 S.E.2d 1 (1994).

Chapter 48A.
Minors.

§ 48A-2. Age of minors.

CASE NOTES

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to § 50-13.7. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Stated in Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422 (1988).

Cited in Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990); Ballard v. Weast, 121 N.C. App. 391, 465 S.E.2d 565 (1996).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

Sec.
49-7. (Effective until June 30, 1998) Issues and orders.
49-7. (Effective June 30, 1998) Issues and orders.
49-8. Power of court to modify orders, suspend sentence, etc.

Article 2.

Legitimation of Illegitimate Children.

Sec.
49-12.1. Legitimation when mother married.

Article 3.

Civil Actions Regarding Illegitimate Children.

49-14. Civil action to establish paternity.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Legal Periodicals. — For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

CASE NOTES

Cited in Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 414, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

I. In General.
V. Instructions, Submission to Jury, and Verdict.

I. IN GENERAL.

Effect of Prosecution upon Subsequent Civil Proceedings, etc. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Applied in Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

And Submission of Interrogatories or Issues, etc. —

Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

Verdict Held Insufficient. —

A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

§ 49-4. When prosecution may be commenced.

CASE NOTES

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. Bertie-Hertford Child Support Enforcement Agency ex rel. Souza v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

§ 49-7. (Effective until June 30, 1998) Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the child, subject to the limitations of G.S. 50-13.10. The amount of child support shall be determined as provided in G.S. 50-13.4(c). The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to

§ 49-7 is set out twice. See notes.

the court to require. The social security number, if known, of the minor child's parents shall be placed in the record of the proceeding. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be as prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1; 1989, c. 529, s. 6; 1997-433, s. 4.1.)

Section Set Out Twice. — The section above is effective until June 30, 1998. For the section as amended June 30, 1998, see the following section, also numbered § 49-7.

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Session Laws 1997-433, s. 11.3, provides that the act expires on June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, inserted the sixth sentence of the first paragraph.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

§ 49-7. (Effective June 30, 1998) Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the child, subject to the limitations of G.S. 50-13.10. The amount of child support shall be determined as provided in G.S. 50-13.4(c). The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be as prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1; 1989, c. 529, s. 6; 1997-433, s. 4.1.)

Section Set Out Twice. — The section above is effective June 30, 1998. For the section as in effect until June 30, 1998, see the preceding section, also numbered § 49-7.

§ 49-8. Power of court to modify orders, suspend sentence, etc.

Upon the determination of the issues set out in G.S. 49-7 and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require subject to the limitations of G.S. 50-13.10. The order or orders made in this regard may include any or all of the following alternatives:

(1) Repealed by Session Laws 1994, Extra Session, c. 14, s. 35, effective October 1, 1994.

(2) Suspend sentence and continue the case from term to term;

(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;

(4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;

(5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this Article. (1933, c. 228, s. 7; 1939, c. 217, s. 6; 1987, c. 739, s. 2; 1994, Ex. Sess., c. 14, s. 35.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 35, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

Cross References. — As to legitimation procedure when mother is married, see § 49-12.1.

Legal Periodicals. —

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

CASE NOTES

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure Within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority, pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Statute Inoperative After Death of Father. — Both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Petition to Be Filed by Father Only. — This statute unambiguously limits the person who may file a legitimation petition to the putative father of any child born out of wedlock; thus, the putative grandfather lacked standing to attempt legitimation. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with adoption petition in lieu of affidavit required by § 48-13, a subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to this section before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). See also § 49-12.1.

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by § 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as § 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). But see now § 49-12.1(c).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under § 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Cited in Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Action Under § 49-14 Prohibited When Child Is Legitimated. — If child is legitimated by virtue of this section, an action under § 49-14 cannot be maintained, as § 49-14 establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

DNA sampling results may be used to rebut the presumption that a child born to a married woman is her husband's child and to simultaneously offer evidence that a person was "born out of wedlock" within the meaning of this section. Batcheldor v. Boyd, 108 N.C. App. 275, 423 S.E.2d 810 (1992), cert. denied, 333 N.C. 254, 426 S.E.2d 700 (1993).

Applied in DOT v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985); Batcheldor v. Boyd, 119 N.C. App. 204, 458 S.E.2d 1 (1995).

§ 49-12.1. Legitimation when mother married.

(a) The putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child. The procedures shall be the same as those specified by G.S. 49-10, except that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. A guardian ad litem shall be appointed to represent the child if the child is a minor.

(b) The presumption of legitimacy can be overcome by clear and convincing evidence.

(c) **(Effective until June 30, 1998)** The parties may enter a consent order with the approval of the clerk of superior court. The order entered by the clerk shall find the facts and declare the proper person the father of the child and may change the surname of the child.

(c) **(Effective June 30, 1998)** The parties may waive a jury trial and enter a consent order with the approval of the clerk of superior court. The order entered by the clerk shall find the facts and declare the proper person the father of the child and may change the surname of the child.

(d) The effect of legitimation under this section shall be the same as provided by G.S. 49-11.

(e) A certified copy of the order of legitimation under this section shall be sent by the clerk of superior court under his official seal to the State Registrar of Vital Statistics who shall make a new birth certificate bearing the full name of the father of the child and, if ordered by the clerk, changing the surname of the child. (1991, c. 667, s. 2; 1991 (Reg. Sess., 1992), c. 1030, s. 15; 1997-433, s. 4.9.)

Subsection (c) Set Out Twice. — The first version of subsection (c) is effective until June 30, 1998. The second version of subsection (c) is effective June 30, 1998.

Editor's Note. — Session Laws 1991,

c. 667, s. 3 made this section effective October 1, 1991.

Session Laws 1997-433, s. 11.3, provides that the act expires on June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, deleted "waive a jury trial and" preceding "enter a consent order" in subsection (c).

CASE NOTES

Marital Presumption Rebuttable. — In the context of a custody dispute between the mother and her husband or former spouse, concerning a child born during their lawful marriage, the marital presumption is rebuttable only upon a showing that another man has formally acknowledged paternity, or has been adjudicated to be the father of the child. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

§ 49-13. New birth certificate on legitimation.

Cross References. — As to new birth certificate, see also § 49-12.1.

CASE NOTES

Cited in Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Article 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) **(Effective until June 30, 1998)** The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. The establishment of paternity shall not have the effect of legitimation. The social security numbers, if known, of the minor child's parents shall be placed in the record of the proceeding.

(a) **(Effective June 30, 1998)** The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) No such action shall be commenced nor judgment entered after the death of the putative father, unless the action is commenced either:

(1) Prior to the death of the putative father;

(2) Within one year after the date of death of the putative father, if a proceeding for administration of the estate of the putative father has not been commenced within one year of his death; or

(3) Within the period specified in G.S. 28A-19-3(a) for presentation of claims against an estate, if a proceeding for administration of the estate of the putative father has been commenced within one year of his death.

Any judgment under this subsection establishing a decedent to be the father of a child shall be entered nunc pro tunc to the day preceding the date of death of the father.

(d) If the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(f) **(Effective until June 30, 1998)** When a determination of paternity is pending in a IV-D case, the court shall enter a temporary order for child support upon motion and showing of clear, cogent, and convincing evidence of paternity. For purposes of this subsection, the results of blood or genetic tests shall constitute clear, cogent, and convincing evidence of paternity if the tests show that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher. If paternity is not thereafter established, then the putative father shall be reimbursed the full amount of temporary support paid under the order.

(g) **(Effective until June 30, 1998)** Invoices for services rendered for pregnancy, childbirth, and blood or genetic testing are admissible as evidence without requiring third party foundation testimony and shall constitute prima facie evidence of the amounts incurred for the services or for testing on behalf of the child. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3; 1995, c. 424, ss. 1, 2; 1997-154, s. 1; 1997-433, ss. 4.2, 4.10.)

Subsection (a) Set Out Twice. — The first version of subsection (a) is effective until June 30, 1998. The second version of subection (a) is effective June 30, 1998.

Editor's Note. — Session Laws 1993, c. 333, s. 3, amended this section effective October 1, 1993, and applicable to civil paternity actions filed on or after that date.

Session Laws 1995, c. 424, which amended subsections (c) and (d), in s. 3 provides that the 1995 amendments to this section are effective October 1, 1995, and are applicable to actions commenced on or after that date, but before October 1, 1998, without regard to the date of death of the putative father.

Session Laws 1997-433, s. 11.3, provides that the act, which amended subsection (a) and added subsections (f) and (g), expires June 30, 1998.

Effect of Amendments. — Session Laws 1997-154, s. 1, effective October 1, 1997, deleted the expiration date of October 1, 1998 from subsections (c) and (d).

Session Laws 1997-433, ss. 4.2 and 4.10, effective October 1, 1997, in subsection (a), substituted "The" for "Such" at the beginning of the next to last sentence, and added the last sentence; and added subsections (f) and (g).

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Editor's Note. — *The cases annotated below were decided prior to the 1993 amendment to § 49-14, which, inter alia, changed the evidentiary standard from beyond a reasonable doubt to clear, cogent and convincing evidence.*

Purpose, etc. —

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

The legislative purpose underlying this section's paternity actions is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Statute Inoperative After Death of Father. — Both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Action Under This Section Prohibited When Child Is Legitimated. — If child is legitimated by virtue of § 49-12, an action under this section cannot be maintained, as this section establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Only Parent Who Has Custody of Child May Bring Action for Support. — Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of § 50-13.4, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Failure to Join Child Does Not Require Dismissal. — In a civil action to establish paternity of an alleged illegitimate child the failure to properly join that child does not justify dismissal of the action. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

If the legislature had intended to require the child to be joined as a necessary party in an action under § 49-14, then it would have specifically stated such, as it did in § 49-10. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

Effect of Criminal Proceedings, etc. —

General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

No Certified Copies of Birth Certificates Attached to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiffs' petition, court was without subject matter jurisdiction to adjudicate defendant's paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Claim of Being Tricked into Fathering Child Not Appropriate as Defense. — Argument of defendant in paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial responsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Standard of Proof. — Section 49-10, just as this section, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. Smith v. Price, 74 N.C. 413, 340 S.E.2d 408 (1986).

Testimony by Expert Concerning Paternity. — Although it may be proper for a qualified physician to testify concerning the result of a defendant's blood test and concerning the use and application of the paternity index, it is not proper to allow the expert to state his opinion concerning paternity, as such an opinion is of no assistance to the trier of fact. The jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under § 49-10 to have child legitimated. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

DNA or Gene Testing. — Trial court erred in ordering DNA or gene testing subsequent to an adjudication of paternity. State ex rel. Hill v. Manning, 110 N.C. App. 770, 431 S.E.2d 207 (1993).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. —

For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

CASE NOTES

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Retroactive Child Support Awards Authorized. — Trial court was not precluded as a matter of law from awarding retroactive child support under this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in § 1-52(2). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under § 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Failure to Attach Certified Copies of Birth Certificates to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiff's petition, court was without subject matter jurisdiction to adjudicate defendants' paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Effect of Criminal Proceedings upon Proceedings to Establish Paternity. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Reimbursement by State upon Receipt of Test Results. — Conclusion that defendant was not child's father and that the State was obligated to reimburse defendant for the monies it illegally garnished from his pay arose as a matter of law from paternity test results, which plaintiff and the court accepted as binding when order was entered, and stating those conclusions and ending the case properly in compliance with the law was the court's duty. State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991).

Cited in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988).

§ 49-16. Parties to proceeding.

CASE NOTES

Quoted in Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

§ 49-17. Jurisdiction over nonresident or nonpresent persons.

CASE NOTES

Constitutionality. — This section satisfies the first prong of the test set out in Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977) by creating special jurisdiction under very limited circumstances; on its face, this statute is constitutionally sound and although the language in this section which refers to "minimum contacts" is misleading and confusing in the context of the Dillon requirements, the intent of the statute is not to abrogate the second prong of the Dillon test; rather, the statute simply creates special jurisdiction in certain situations. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Due Process Requirements Satisfied. — In paternity suit, where the trial court adequately inquired into the defendant's contacts with this State and so set those findings out in its order without objection of the defendant, the hearing which was held on defendant's motion to dismiss for lack of personal jurisdiction comported with all due process requirements. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

North Carolina courts have a legitimate interest in protecting our citizens under circumstances such as those enumerated in this section. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Chapter 49A.

Rights of Children.

Article 1.

Children Conceived by Artificial Insemination.

§ 49A-1. Status of child born as a result of artificial insemination.

Legal Periodicals. — For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Sec.
50-8. (Effective until June 30, 1998) Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.
50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.
50-13.4. (For applicability see note) Action for support of minor child.
50-13.9. Procedure to insure payment of child support.
50-13.11. (Effective until June 30, 1998) Orders and agreements regarding medical support and health insurance coverage for minor children.
50-13.12. (Effective until June 30, 1998) Forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings.
50-16.1. [Repealed.]
50-16.2. [Repealed.]
50-16.5. [Repealed.]
50-20. Distribution by court of marital property upon divorce.
50-20.1. Pension and retirement benefits.
50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

Article 2.

Expedited Process for Child Support Cases.

Sec.
50-30. Findings; policy; and purpose.
50-33. Waiver of expedited process requirement.

ARTICLE 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-6. Divorce after separation of one year on application of either party.

Legal Periodicals. —

For article, "Bromhal v. Stott: Revisiting the Court's Role in Separation Agreements in the Context of Attorneys' Fees," see 74 N.C.L. Rev. 2151 (1996).

CASE NOTES

I. In General.

I. IN GENERAL.

Child Support Action Not Barred. — The inclusion in divorce judgment of a paragraph identifying plaintiff's former husband as the father of plaintiff's child operated only to identify the existence of a child born of the marriage and was not the subject of litigation; thus, collateral estoppel did not bar child support action against defendant. Guilford County ex rel. Child Support Enforcement Unit ex rel. Gardner v. Davis, 123 N.C. App. 527, 473 S.E.2d 640 (1996).

Stated in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-8. (Effective until June 30, 1998) Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce, except in actions for divorce from bed and board, have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause for divorce is one-year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally or service of summons accepted by the defendant personally in the manner provided in G.S. 1A-1, Rule 4(j)(1). Notwithstanding any other provision of this section, any suit or action for divorce heretofore instituted by a nonresident of this State in which the defendant was personally served with summons or in which the defendant personally accepted service of the summons and the case was tried and final judgment entered in a court of this State in a county other than the county of the defendant's residence, is hereby validated and declared to be legal and proper, the same as if the suit or action for divorce had been brought in the county of the defendant's residence.

In all divorce actions the complaint shall set forth the name and age of any minor child or children of the marriage, and in the event there are no minor children of the marriage, the complaint shall so state. In addition, when there are minor children of the marriage, the complaint shall state the social security number of the plaintiff and, if known, the social security number of the defendant.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by Rule 11 of the Rules of Civil Procedure, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verifica-

§ 50-8 has a delayed effective date. See notes.

tion to the complaint in said suits or actions are not in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variation in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce. The judgment of divorce shall include, where there are minor children of the parties, the social security numbers of the parties. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C.S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1; 1967, c. 50; c. 954, s. 3; 1969, c. 803; 1971, c. 415; 1973, c. 39; 1981, c. 599, s. 15; 1997-433, s. 4.3.)

Section Effective Until June 30, 1998. —

The section above is effective until June 30, 1998. For the section effective June 30, 1998, see the main pamphlet.

Editor's Note. —

Session Laws 1997-433, s. 11.3, provides that the act expires on June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, in the second paragraph, deleted "such" preceding "minor children" and added the last sentence, and added the last sentence of the last paragraph.

§ 50-13.1. Action or proceeding for custody of minor child.

Legal Periodicals. —

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

CASE NOTES

Consideration of Prior Orders. — The trial court did not err in considering temporary custody orders and prior contempt orders in determining the issue of child custody. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Rights of Presumed Parents. — Where there was no evidence another man had either been adjudicated the father of the child or acknowledged paternity, the marital presumption, that plaintiff was the natural father of the child, had not been rebutted and plaintiff thus had standing under this section to seek visitation rights with the child. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

Grandparents' Rights When Family Intact. — Reading subsection (a) in conjunction with §§ 50-13.2(b1), 50-13.5(j), and 50-13.2A strongly suggests that the legislature did not intend "custody" and "visitation" to be interpreted as synonymous in the context of grandparents' rights. The three special statutes provide grandparents with the right to seek "visitation" only in certain clearly specified situations. Those situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Section 50-13.1(a) does not grant plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Grandparents do not have standing pursuant to subsection (a) to seek visitation with their grandchildren when the natural parents have legal custody of their children and are living with them as an intact family. Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

Section 50-13.5(j) makes it clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding, but it does not restrict their right to bring an initial custody suit pursuant to this section when there are allegations that the parent is unfit. Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

Subsection (a) grants grandparents the right to bring an initial suit for custody when there are allegations that the child's parents are unfit. Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

Family Units. — Unmarried parents living with their children have been accorded recognition as family units. Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

A single parent living with his or her child is an intact family. Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence. Such orders may include a designation of time and place for the exchange of children away from the abused party, the participation of a third party, or supervised visitation. If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court.

(d) If, within a reasonable time, one parent fails to consent to adoption pursuant to Chapter 48 of the General Statutes or parental rights have not been terminated, the consent of the other consenting parent shall not be effective in an action for custody of the child. (1957, c. 545; 1967, c. 1153, s. 2; 1977, c. 501, s. 2; 1979, c. 967; 1981, c. 735, ss. 1, 2; 1985, c. 575, s. 3; 1987, c. 541, s. 2; c. 776; 1995 (Reg. Sess., 1996), c. 591, s. 5.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, added the second sentence of subsection (a); and added the third, fourth, and fifth sentences of subsection (b).

Legal Periodicals. —

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

CASE NOTES

I. In General.
II. Welfare of Child.
III. Right of Parents to Custody.
  A. As Against Third Persons.
IV. Visitation Rights.
VII. Findings of Fact.
VIII. Effect of Verdicts, Separation Agreements and Consent Judgments.

I. IN GENERAL.

Provisions in Custody Orders. — Provisions directing the parties to cooperate with one another and to refrain from conduct that will be detrimental to the child are commonly included in custody orders. Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995), appeal dismissed, 343 N.C. 128, 468 S.E.2d 795 (1996).

II. WELFARE OF CHILD.

A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

III. RIGHT OF PARENTS TO CUSTODY.

A. As Against Third Persons.

Due Process. — If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child ' standard in a custody dispute with a nonparent would offend the Due Process Clause. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Conduct inconsistent with a parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the 'best interest of the child' test without offending the Due Process Clause. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Fitness of Parent. — Mother's convictions for driving while intoxicated and child's developmental problems were significant and relevant to issue of mother's fitness as a parent because they indicated her inability to care for the child adequately and to provide for the child's welfare; additionally, the facts that she had substance abuse problems, did not respect authority, was unable to recognize her child's developmental problems, and was incapable of caring for the child's welfare supported the conclusion that she was an unfit parent. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Temporary Relinquishment of Custody. — There are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody; however, to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that it is temporary and avoid conduct inconsistent with the protected parental interests. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Socioeconomic status of paternal grandmother, who intervened in custody case, was irrelevant to issue of mother's fitness as a parent. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

It is only when the custody of a child is "in issue" or "being litigated" that the grandparents are entitled to relief pursuant to subsection (b1). Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

Reversal of Award to Third Party. — Where in an initial custody determination, the trial court conducted the "best interest and welfare" analysis, and based solely on that analysis, awarded custody of the minor child to defendant (friend of mother who had cared for child since birth) rather than the plaintiff/father, the child's natural parent, the award of custody on this basis was error and must be reversed. Lambert v. Riddick, 120 N.C. App. 480, 462 S.E.2d 835 (1995).

IV. VISITATION RIGHTS.

Grandparents May Not Be Awarded Visitation Rights When Custody Is Not in Issue. —

This section and §§ 50-13.5 and 50-13.2A must be read in conjunction with § 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

VII. FINDINGS OF FACT.

Use of Fifth Amendment Privilege. — Father could not take advantage of the presumption that it is in the best interest of the child to be in the custody of his natural parent by introducing evidence of his fitness and then invoking his Fifth Amendment privilege against self-incrimination when questioned about his illegal drug activity. Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996).

Where the father failed to make a showing of fitness and the court could not determine his fitness because of his assertion of the Fifth Amendment, the court acted properly in dismissing his claim for custody. Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996).

VIII. EFFECT OF VERDICTS, SEPARATION AGREEMENTS AND CONSENT JUDGMENTS.

Trial court did not abuse its discretion in awarding joint custody to both parties. Church v. Church, 119 N.C. App. 436, 458 S.E.2d 732 (1995).

§ 50-13.2A. Action for visitation of an adopted grandchild.

CASE NOTES

Custody Must Be at Issue. — Sections 50-13.2, 50-13.5, and this section must be read in conjunction with § 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Cited in Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

§ 50-13.4. (For applicability see note) Action for support of minor child.

(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child. In the absence of pleading and proof that the circumstances otherwise warrant, parents of a minor, unemancipated child who is the custodial or noncustodial parent of a child shall share this primary liability for their grandchild's support with the minor parent, the court determining the proper share, until the minor parent reaches the age of 18 or becomes emancipated. If both the parents of the child requiring support were unemancipated minors at the time of the child's conception, the parents of both minor parents share primary liability for their grandchild's support until both minor parents reach the age of 18 or become emancipated. If only one parent of the child requiring support was an unemancipated minor at the time of the child's conception, the parents of both parents are liable for any arrearages in child support owed by the adult or emancipated parent until the other parent reaches the age of 18 or becomes emancipated. In the absence of pleading and proof that the circumstances otherwise warrant, any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1). However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

(c1) Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. Prior to May 1, 1990 these guidelines and criteria shall be reported to the General Assembly by the Administrative Office of the Courts by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.

Periodically, but at least once every four years, the Conference of Chief District Judges shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly. The Conference shall give the Department of Health and Human Services, the Administrative Office of the Courts, and the general public an opportunity to provide the Conference with information relevant to the development and review of the guidelines. Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The guidelines, when adopted or modified, shall be provided to the Department of Health and Human Services and the Administrative Office of the Courts, which shall disseminate them to the public through local IV-D offices, clerks of court, and the media.

Until July 1, 1990, the advisory guidelines adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall operate as presumptive guidelines and the factors adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall constitute criteria for varying from the amount of support determined by the guidelines.

(d) **(Effective until June 30, 1998)** In non-IV-D cases, payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of the child. In IV-D cases, payments for the support of a minor child shall be ordered to be paid to the court or other proper State agency for the benefit of the child.

(d) **(Effective June 30, 1998)** Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(d1) For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or postseparation support is also ordered, the order shall separately state and identify each allowance.

(e1) **(Effective until June 30, 1998)** In IV-D cases, the order for child support shall provide that the clerk shall transfer the case to another jurisdiction in this State if the IV-D agency requests the transfer on the basis that the obligor, the custodian of the child, and the child do not reside in the jurisdiction in which the order was issued. The IV-D agency shall provide notice of the transfer to the obligor by delivery of written notice in accordance with the notice requirements of Chapter 1A-1, Rule 5(b) of the Rules of Civil Procedure. The clerk shall transfer the case to the jurisdiction requested by the IV-D agency, which shall be a jurisdiction in which the obligor, the custodian of the child, or the child resides. Nothing in this subsection shall be construed to prevent a party from contesting the transfer.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in action for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) **(Effective until June 30, 1998)** Except as provided in Article 15 of Chapter 44 of the General Statutes, a judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(8) **(Effective June 30, 1998)** A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) An order for the periodic payments of child support is enforceable by proceedings for civil contempt, and its dis-

obedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

(g) **(Effective until June 30, 1998)** An individual who brings an action or motion in the cause for the support of a minor child, and the individual who defends the action, shall provide to the clerk of the court in which the action is brought or the order is issued, the individual's social security number. The child support order shall contain the social security number of the parties as evidenced in the support proceeding.

(h) **(Effective until June 30, 1998)** Child support orders initially entered or modified on and after October 1, 1998, shall contain the name of each of the parties, the date of birth of each party, the social security number of each party, and the court docket number. The Administrative Office of the Courts shall transmit to the Department of Health and Human Services, Child Support Enforcement Program, on a timely basis, the information required to be included on orders under this subsection. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3; 1983, c. 54; c. 530, s. 1; 1985, c. 689, s. 17; 1985 (Reg. Sess., 1986), c. 1016; 1989, c. 529, ss. 1, 2; 1989 (Reg. Sess., 1990), c. 1067, s. 2; 1993, c. 335, s. 1; c. 517, s. 5; 1995, c. 319, s. 9; c. 518, s. 1; 1997-433, ss. 2.1(a), 2.2, 4.4, 7.1; 1997-443, ss. 11A.118(a), 11A.122.)

Subsections (d) and (f)(8) Set Out Twice. — The first versions of subsections (d) and (f)(8) are effective until June 30, 1998. The second versions of subsections (d) and (f)(8) are effective June 30, 1998.

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-433, s. 11.3, provides that the act, which affected subsections (d), (e1), (g), and (h), and subdivision (f)(8), expires June 30, 1998.

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. —

Session Laws 1997-433, s. 2.1, effective October 1, 1997, and applicable to orders entered or modified on and after October 1, 1997, in subsection (d) inserted "In non-IV-D cases", substituted "the child" for "such child", and added the last sentence.

Session Laws 1997-433, s. 2.2, effective October 1, 1997, added subsection (e1).

Session Laws 1997-443, s. 4.4, effective October 1, 1997, added subsections (g) and (h).

Session Laws 1997-433, s. 7.1, effective October 1, 1997, inserted "Except as provided in Article 15 of Chapter 44 of the General Statutes" in subdivision (f)(8).

Session Laws 1997-443, ss. 11A.118(a) and 11A.122, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in subsection (h).

CASE NOTES

I. In General.
III. Liability for Support.
IV. Amount of Support.
  A. In General.
V. Termination of Obligation.
  A. In General.
VIII. Appellate Review.
IX. Remedies.
  F. Retroactive Support and Reimbursement.
  G. Contempt.

I. IN GENERAL.

Editor's Note. — *The case of Gilliard v. Kirk, 633 F. Supp. 1529 (W.D. N.C. 1986), annotated in the main volume under the catchline "Deeming of Support Payments for AFDC Purposes" was reversed by 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987).*

Public Policy. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Cited in Moyer v. Moyer, 122 N.C. App. 723, 471 S.E.2d 676 (1996).

III. LIABILITY FOR SUPPORT.

Non-Biological Parents. — The court will not impose the burden of child support on a non-biological parent who has not voluntarily assumed such an obligation. Pott v. Pott, — N.C. App. —, 484 S.E.2d 822 (1997).

Persons Standing in Loco Parentis. — Although support of a child ordinarily is a parental obligation, other persons standing in loco parentis may also acquire a duty to support the child; thus, in a case where custodial father and child had believed him to be the father of the child, the duty of support should have accompanied the right to custody. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

IV. AMOUNT OF SUPPORT.

A. In General.

Deviation From Guidelines. — According to the statute, the trial court has the discretion to deviate from the presumptive guidelines in only two situations: (1) when application does not meet or exceeds the reasonable needs of the child; or (2) when application would be unjust or inappropriate. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 120 N.C. App. 260, 461 S.E.2d 798 (1995), modified, 344 N.C. 166, 473 S.E.2d 6 (1996).

When Ability to Pay Determined. — A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Interest in Corporations or Partnerships and Nontaxable Income Relevant. — The value and nature of defendant's interest in any partnerships or corporations and the terms of any trust of which he might be the beneficiary, as well as the amount of income, including non-taxable, deferred or declined income, flowing therefrom, would all bear relevance to child support proceeding. Shaw v. Cameron, 125 N.C. App. 522, 481 S.E.2d 365 (1997).

Exclusive Ownership or Control of Estate Irrelevant. — Any judgment rendered against defendant setting an amount of child support would be dependent in significant part upon the amount of his income and the nature of his estate, whether exclusively owned or controlled by defendant, or jointly with others. Shaw v. Cameron, 125 N.C. App. 522, 481 S.E.2d 365 (1997).

Finding Where Award Is Based on Capacity to Earn. —

A party's capacity to earn income may

become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Third-party contributions may be used to support a deviation from North Carolina Child Support Guidelines, even where third parties are under no legal obligation to make such payments. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 344 N.C. 166, 473 S.E.2d 6 (1996).

Education and Insurance Expenses. — Defendant's argument that provisions to pay for higher education and to provide life and health insurance were not in the nature of child support was not without merit. Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Imputed Income. — Where there was no evidence that defendant, who worked for a school system as a psychologist, intentionally depressed his income or otherwise engaged in bad faith, the trial court erred by imputing income to defendant for four weeks during the school district summer recess. Ellis v. Ellis, — N.C. App. —, 485 S.E.2d 82 (1997).

Change in Circumstances Not Shown. — Where the trial court found that defendant voluntarily quit his job, willfully and intentionally depressed his income, and failed to meet his burden of proof in showing a substantial change of circumstances, the court entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

V. TERMINATION OF OBLIGATION.

A. In General.

When Legal Obligation to Support, etc. —

In accord with second paragraph in the main volume. See Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422, aff'd, 323 N.C. 617, 374 S.E.2d 275 (1988).

VIII. APPELLATE REVIEW.

Presumption Allowing Modification. — The presumption, created in a 1994 revision, allowing modification of a child support order which is at least three years old, when there is a disparity of 15% or more between the amount of support payable under the original order and the amount owed based on the parties' current income and expenses, is within the scope of the legislative mandate to ensure adequate child support awards over time. Garrison v. Connor, 122 N.C. App. 702, 471 S.E.2d 644 (1996).

IX. REMEDIES.

F. Retroactive Support and Reimbursement.

Measure of Liability, etc. —

In accord with the main volume. See Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

G. Contempt.

Willfulness Is Required, etc. —

In accord with the main volume. See Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess., 1994), N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.9, 50-13.11 and subsection (f) of this section. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.5. Procedure in actions for custody or support of minor children.

CASE NOTES

I. In General.
VII. Visitation Rights.
  A. In General.
  C. Grandparents' Rights.

I. IN GENERAL.

Change in Circumstances. — Where parent was found to be a fit and proper parent, and in a later order found to be an unfit parent, the finding of unfitness constituted a change in circumstances. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Cited in McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995); Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

VII. VISITATION RIGHTS.

A. In General.

Trial court is not required to make specific findings to support a visitation schedule whenever a party contends the frequency of visitation is not reasonable. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

C. Grandparents' Rights.

Right to File Suit. — Subsection (j) of this section makes it clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding, but it does not restrict their right to bring an initial custody suit pursuant to § 50-13.1 when there are allegations that the parent is unfit. Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

I. In General.

I. IN GENERAL.

The legislature set different standards in actions for support and in actions for custody and support in enacting this section. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

This section does not require a determination that one spouse is a dependent spouse and the other a supporting spouse. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

Settlement Agreement May Provide for Recovery of Attorney's Fees. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Consideration of Estate. — Trial court, in ruling on a motion for attorney's fees in a child custody and support action, may determine that a party has sufficient means to defray the cost of the action without considering the estate of the other party. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

Trial Court Erred in Considering Relative Estates of Parties. — Where the evidence failed to show that defendant did not have ample income to defray the expenses of the action and would have been required to deplete her estate to pay expenses, the trial court erred in considering the relative estates of the parties in assessing the defendant's ability to employ "adequate" counsel. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

- I. In General.
- II. Modification, Generally.
- III. Change in Circumstances.
- V. Findings and Discretion of Trial Court.
- VII. Procedure.

I. IN GENERAL.

No Voluntary Dismissal of Final Order Permitted. — Under Rule 41(a) and existing case law, parties may not voluntarily dismiss a final custody and child support order. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

Cited in Garrison v. Connor, 122 N.C. App. 702, 471 S.E.2d 644 (1996); Kelly v. Otte, 123 N.C. App. 585, 474 S.E.2d 131 (1996).

II. MODIFICATION, GENERALLY.

Statutory Compliance Required. — Since there is a statutory procedure for modifying a custody determination, a party seeking modification of a custody decree must comply with its provisions. Bivens v. Cottle (Westlake), 120 N.C. App. 467, 462 S.E.2d 829 (1995).

A court is without authority to sua sponte modify an existing support order. Royall v. Sawyer, 120 N.C. App. 880, 463 S.E.2d 578 (1995).

Since the ruling in Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994) that recognized the constitutionally — protected paramount right of parents to custody, the ruling has been interpreted to apply only to an initial custody determination, and not to motions for change of custody based on changed circumstances. Speaks v. Fanek, 122 N.C. App. 389, 470 S.E.2d 82 (1996).

Order May Not Be Vacated by Stipulation. — Where an order of the trial court awarding plaintiff permanent custody and obligating defendant to pay permanent child support was rendered, nothing in Rule 41 granted authority to the parties, without action by the trial court, to vacate by stipulation the order previously entered in the action. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

An order providing for temporary child support is not an appealable final order, whereas an order providing for permanent child support until emancipation is an appealable final order even though permanent child support orders may be modified upon a showing of change of circumstances. Banner v. Hatcher, 124 N.C. App. 439, 477 S.E.2d 249 (1996).

Modification of Custody and Support Provisions Erroneous. —

Where there was no evidence that defendant, who worked for a school system as a psychologist, intentionally depressed his income or otherwise engaged in bad faith, the trial court erred by imputing income to defendant for four weeks during the school district summer recess. Ellis v. Ellis, — N.C. App. —, 485 S.E.2d 82 (1997).

III. CHANGE IN CIRCUMSTANCES.

A change in circumstances must be shown, etc. —

There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified. Bivens v. Cottle (Westlake), 120 N.C. App. 467, 462 S.E.2d 829 (1995).

Change of Circumstances in Conclusion of Law. — A substantial change of circumstances is unequivocally a conclusion of law, meaning that a change has occurred among the parties, and that change has affected the welfare of the children involved. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

A finding of change in child-oriented expenses is not a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances. Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995).

Ability to Pay. —

A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Imposition of Earnings Capacity Rule. — A party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Finding of Unfitness. — Where parent was found to be a fit and proper parent, and in a later order found to be an unfit parent, the finding of unfitness constituted a change in circumstances. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Showing of Changed Circumstances Held Insufficient. — Where the trial court found that defendant voluntarily quit his job, willfully and intentionally depressed his income, and failed to meet his burden of proof in showing a substantial change of circumstances, the court entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Reduction of Custodial Parent's Income on Return to School. — Plaintiff who quit her job to attend college could claim a voluntary reduction in income as a change of circumstance. Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

Findings Held Insufficient. — Where the factors listed by the trial court as dispositive on the substantial change of circumstance requirement were oriented toward parental fitness, not adverse alterations of the children's welfare, and were bare observations of plaintiff's or defendant's actions, not examples of how those actions adversely impacted the children, the findings, without more, did not meet the standard required to show circumstances must be so changed that the welfare of the child would be adversely affected unless the custody provision was modified. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

VII. PROCEDURE.

Where the only issue before the trial court was the custody of plaintiff's and defendant's son and there was no motion to modify the child support, the trial court was without authority to issue an order modifying an earlier consent order setting child support. Royall v. Sawyer, 120 N.C. App. 880, 463 S.E.2d 578 (1995).

§ 50-13.9. Procedure to insure payment of child support.

(a) Upon its own motion or upon motion of either party, the court may order at any time that support payments be made to the clerk of court for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(b) After entry of such an order by the court, the clerk of superior court shall transmit child support payments that are made to the clerk in IV-D cases to the Department of Health and Human Services for appropriate distribution. In all other cases, the clerk shall transmit the payments to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(b1) In a IV-D case:

(1) The designated child support enforcement agency shall have the sole responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate.

(2) The clerk of court shall maintain all official records in the case.

(3) The designated child support enforcement agency shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received.

(b2) In a non-IV-D case:

(1) The clerk of court shall have the responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate.

(2) The clerk of court shall maintain all official records in the case.

(3) The clerk of court shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received.

(c) In a non-IV-D case, the parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order. In a IV-D case, the parties affected by the order shall inform the designated child support enforcement agency of any change of address or other condition that may affect the administration of the order. The court may provide in the order that a party failing to inform the court or, as appropriate, the designated child support enforcement agency, of a change of address within a reasonable period of time may be held in civil contempt.

(d) In a non-IV-D case, when an obligor fails to make a required payment of child support and is in arrears, the clerk of superior court shall mail by regular mail to the last known address of the obligor a notice of delinquency. The notice shall set out the amount of child support currently due and shall demand immediate payment of said amount. The notice shall also state that failure to make immediate payment will result in the issuance by the court of an enforcement order requiring the obligor to appear before a district court judge and show cause why the support obligation should not be enforced by income withholding, contempt of court, revocation of licensing privileges, or other appropriate means. Failure to receive the delinquency notice shall not be a defense in any subsequent proceeding. Sending the notice of delinquency shall be in the discretion of the clerk if the clerk has, during the previous 12 months, sent a notice or notices of delinquency to the obligor for nonpayment, or if income withholding has been implemented against the obligor or the obligor has been previously found in contempt for nonpayment under the same child support order.

If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or without waiting the 21 days if the clerk has elected not to mail a delinquency notice for any of the reasons provided herein, the clerk shall cause an enforcement order to be issued and shall issue a notice of hearing before a district court judge. The enforcement order shall order the obligor to appear and show cause why he should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to his employment, his licensing privileges, and the amount and sources of his disposable income. The enforcement order shall state:

(1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;

(2) That the obligor is delinquent and the amount of overdue support;

(2a) That the court may order the revocation of some or all of the obligor's licensing privileges if the obligor is delinquent in an amount equal to the support due for one month;

(3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;

(4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;

(5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;

(6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate.

The enforcement order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. The clerk shall also notify the party to whom support is owed of the pending hearing. The clerk may withdraw the order to the supporting party upon receipt of the delinquent payment. On motion of the person to whom support is owed, with the approval of the district court judge, if the district court judge finds it is in the best interest of the child, no enforcement order shall be issued.

When the matter comes before the court, the court shall proceed as in the case of a motion for income withholding under G.S. 110-136.5. If income withholding is not an available or adequate remedy, the court may proceed with contempt, imposition of a lien, or other available, appropriate enforcement remedies.

This subsection shall apply only to non-IV-D cases, except that the clerk shall issue an enforcement order in a IV-D case when requested to do so by an IV-D obligee.

(e) The clerk of court shall maintain and make available to the district court judge a list of attorneys who are willing to undertake representation, pursuant to this section, of persons to whom child support is owed. No attorney shall be placed on such list without his permission.

(f) At least seven days prior to an enforcement hearing as set forth in subsection (d), the clerk must notify the district court judge of all cases to be heard for enforcement at the next term, and the judge shall appoint an attorney from the list described in subsection (e) to represent each party to whom support payments are owed if the judge deems it to be in the best interest of the child for whom support is being paid, unless:

(1) The attorney of record for the party to whom support payments are owed has notified the clerk of court that he will appear for said party; or

(2) The party to whom support payments are owed requests the judge not to appoint an attorney; or

(3) An attorney for the enforcement of child support obligations pursuant to Title IV, Part D, of the Social Security Act as amended is available.

The judge may order payment of reasonable attorney's fees as provided in G.S. 50-13.6.

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding. (1983, c. 677, s. 1; 1985 (Reg. Sess., 1986), c. 949, ss. 3-6; 1989, c. 479; 1993, c. 517, s. 6; c. 553, s. 67.1; 1995, c. 444, s. 1; c. 538, s. 1.2; 1997-443, s. 11A.118(a).)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. —

The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in subsection (b).

OPINIONS OF ATTORNEY GENERAL

Child Support Enforcement Proceedings. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess. 1994) N.C. Session Laws Ch. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.4(f), this section and 50-13.11. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.

CASE NOTES

Cited in Kelly v. Otte, 123 N.C. App. 585, 474 S.E.2d 131 (1996).

§ 50-13.11. (Effective until June 30, 1998) Orders and agreements regarding medical support and health insurance coverage for minor children.

(a) The court may order a parent of a minor child or other responsible party to provide medical support for the child, or the parties may enter into a written agreement regarding medical support for the child. An order or agreement for medical support for the child may require one or both parties to pay the medical, hospital, dental, or other health care related expenses.

§ 50-13.11 has a delayed effective date. See notes

(a1) The court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance is available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism. The court may require one or both parties to maintain dental insurance.

(b) The party ordered or under agreement to provide health insurance shall provide written notice of any change in the applicable insurance coverage to the other party.

(c) The employer or insurer of the party required to provide health, hospital, and dental insurance shall release to the other party, upon written request, any information on a minor child's insurance coverage that the employer or insurer may release to the party required to provide health, hospital, and dental insurance.

(d) When a court order or agreement for health insurance is in effect, the signature of either party shall be valid authorization to the insurer to process an insurance claim on behalf of a minor child.

(e) If the party who is required to provide health insurance fails to maintain the insurance coverage for the minor child, the party shall be liable for any health, hospital, or dental expenses incurred from the date of the court order or agreement that would have been covered by insurance if it had been in force.

(f) When a noncustodial parent ordered to provide health insurance changes employment and health insurance coverage is available through the new employer, the obligee shall notify the new employer of the noncustodial parent's obligation to provide health insurance for the child. Upon receipt of notice from the obligee, the new employer shall enroll the child in the employer's health insurance plan. (1989 (Reg. Sess., 1990), c. 1067, s. 1; 1991, c. 419, s. 2; c. 761, s. 42; 1997-433, s. 3.1.)

Section Effective Until June 30, 1998. —

The section above is effective until June 30, 1998. For the section effective June 30, 1998, see the main pamphlet.

Editor's Note. —

Session Laws 1997-443, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted the present last sentence of subsection (a) for "An order or agreement for medical support may require one or both parties to maintain health insurance, dental insurance, or both, or to pay the medical, hospital, or dental expenses"; added subsections (a1) and (f); and substituted "health" for "medical" throughout the section.

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess., 1994), N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.4(f), 50-13.9 and this section. See opinion of Attorney General to Patricia Crawford, Associate General

Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.12. (Effective until June 30, 1998) Forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings.

(a) As used in this section, the term:

(1) "Licensing board" means a department, division, agency, officer, board, or other unit of state government that issues hunting, fishing, trapping, drivers, or occupational licenses or licensing privileges.

(2) "Licensing privilege" means the privilege of an individual to be authorized to engage in an activity as evidenced by hunting, fishing, or trapping licenses, regular and commercial drivers licenses, and occupational, professional, and business licenses.

(3) "Obligee" means the individual or agency to whom a duty of support is owed or the individual's legal representative.

(4) "Obligor" means the individual who owes a duty to make child support payments under a court order.

(5) "Occupational license" means a license, certificate, permit, registration, or any other authorization issued by a licensing board that allows an obligor to engage in an occupation or profession.

(b) Upon a finding by the district court judge that the obligor is willfully delinquent in child support payments equal to at least one month's child support, or upon a finding that a person has willfully failed to comply with a subpoena issued pursuant to a child support or paternity establishment proceeding, and upon findings as to any specific licensing privileges held by the obligor or held by the person subject to the subpoena, the court may revoke some or all of such privileges until the obligor shall have paid the delinquent amount in full, or, as applicable, until the person subject to the subpoena has complied with the subpoena. The court may stay any such revocation pertaining to the obligor upon conditions requiring the obligor to make full payment of the delinquency over time. Any such stay shall further be conditioned upon the obligor's maintenance of current child support. The court may stay the revocation pertaining to the person subject to the subpoena upon a finding that the person has complied with or is no longer subject to the subpoena. Upon an order revoking such privileges of an obligor that does not stay the revocation, the clerk of superior court shall notify the appropriate licensing board that the obligor is delinquent in child support payments and that the obligor's licensing privileges are revoked until such time as the licensing board receives proof of certification by the clerk that the obligor is no longer delinquent in child support payments. Upon an order revoking such privileges of a person subject to the subpoena that does not stay the revocation, the clerk of superior court shall notify the appropriate licensing board that the person has failed to comply with the subpoena issued pursuant to a child support or paternity establishment proceeding and that

§ 50-13.12 has a delayed effective date. See notes

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the person's licensing privileges are revoked until such time as the licensing board receives proof of certification by the clerk that the person is in compliance with or no longer subject to the subpoena.

(c) An obligor may file a request with the clerk of superior court for certification that the obligor is no longer delinquent in child support payments upon submission of proof satisfactory to the clerk that the obligor has paid the delinquent amount in full. A person whose licensing privileges have been revoked under subsection (b) of this section because of a willful failure to comply with a subpoena may file a request with the clerk of superior court for certification that the person has met the requirements of or is no longer subject to the subpoena. The clerk shall provide a form to be used for a request for certification. If the clerk finds that the obligor has met the requirements for reinstatement under this subsection, then the clerk shall certify that the obligor is no longer delinquent and shall provide a copy of the certification to the obligor. Upon request of the obligor, the clerk shall mail a copy of the certification to the appropriate licensing board. If the clerk finds that the person whose licensing privileges have been revoked under subsection (b) of this section for failure to comply with a subpoena has complied with or is no longer subject to the subpoena, then the clerk shall certify that the person has met the requirements of or is no longer subject to the subpoena and shall provide a copy of the certification to the person. Upon request of the person, the clerk shall mail a copy of the certification to the appropriate licensing board.

(d) If licensing privileges are revoked under this section, the obligor may petition the district court for a reinstatement of such privileges. The court may order the privileges reinstated conditioned upon full payment of the delinquency over time. Any order allowing license reinstatement shall additionally require the obligor's maintenance of current child support. If the licensing privileges of a person other than the obligor are revoked under this section for failure to comply with a subpoena, the person may petition the district court for reinstatement of the privileges. The court may order the privileges reinstated if the person has complied with or is no longer subject to the subpoena that was the basis for revocation. Upon reinstatement under this subsection, the clerk of superior court shall certify that the obligor is no longer delinquent and provide a copy of the certification to the obligor. Upon request of the obligor, the clerk shall mail a copy of the certification to the appropriate licensing board. Upon reinstatement of the person whose licensing privileges were revoked based on failure to comply with a subpoena, the clerk of superior court shall certify that the person has complied with or is no longer subject to the subpoena. Upon request of the person whose licensing privileges are reinstated, the clerk shall mail a copy of the certification to the appropriate licensing board.

(e) An obligor or other person whose licensing privileges are reinstated under this section may provide a copy of the certification set forth in either subsection (c) or (d) to each licensing agency to which the obligor or other person applies for reinstatement of licensing privileges. Upon request of the obligor or other person, the clerk shall mail a copy of the certification to the appropriate licensing board. Upon receipt of a copy of the certification, the licensing board shall reinstate the license.

§ 50-13.12 has a delayed effective date. See notes

(f) Upon receipt of notification by the clerk that an obligor's or other person's licensing privileges are revoked pursuant to this section, the board shall note the revocation on its records and take all necessary steps to implement and enforce the revocation. These steps shall not include the board's independent revocation process pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act, which process is replaced by the court process prescribed by this section. The revocation pertaining to an obligor shall remain in full force and effect until the board receives certification under this section that the obligor is no longer delinquent in child support payments. The revocation pertaining to the person whose licensing privileges were revoked on the basis of failure to comply with a subpoena shall remain in full force and effect until the board receives certification of reinstatement under subsection (d) of this section. (1995, c. 538, ss. 1, 1.1; 1997-433, s. 5.3.)

Section Effective Until June 30, 1998. — The section above is effective until June 30, 1998. For the section effective June 30, 1998, see the main pamphlet.

Editor's Note. —

Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. —

The 1997 amendment, effective October 1, 1997, rewrote this section.

§ 50-16.1: (For continued applicability see editor's note) Repealed by Session Laws 1995, c. 319, s. 1, effective October 1, 1995.

Legal Periodicals. —

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.
IV. Dependent Spouse.

I. IN GENERAL.

Applied in Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988); Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

Quoted in Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Cited in Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706 (1988); Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988); Rudisill v. Rudisill, 102 N.C. App. 280, 401 S.E.2d 818 (1991); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994), aff'd, 340 N.C. 97, 455 S.E.2d 156, reh'g denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

IV. DEPENDENT SPOUSE.

Construction With Other Sections. — Whether a spouse is substantially in need of maintenance and support as defined by § former 50-16.1(3) is determined by construing this statute in pari material with the terms of former § 50-16.5 which prescribed factors for the trial court to consider in determining the amount of alimony. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

For a spouse to be "actually substantially dependent", etc. —

In accord with second paragraph in the main volume. See Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The term "actually substantially dependent," as used in the first portion of the definition in subdivision (3), means that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation; thus to qualify as a dependent spouse under that portion of subdivision (3), the spouse seeking alimony must be actually without means for providing for his or her accustomed standard of living. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

And Even Spouse Who Is Not "Actually Substantially Dependent" May Be Substantially in Need. — Even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of subdivision (3) of this section if he or she is substantially in need of maintenance and support, the meaning of which is determined by construing this statute in pari materia with the terms of § 50-16.5. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The trial court must evaluate the parties' income and expenses measured by the standard of living of the family as a unit in order to determine if a spouse is "actually substantially dependent." Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Spouse Not Dependent. —

Where the uncontradicted evidence disclosed that the year before the parties separated, the plaintiff had an income of $18,339.97 and the defendant had an income of $20,475.11, and the year they separated, the plaintiff's income was $19,301.46 and the defendant's income was $24,447.26, and that during the last year that they lived together, they maintained separate bank accounts and divided household expenses, evidence did not support the ultimate finding that the plaintiff was substantially and materially dependent upon the defendant for her support and maintenance, and the trial court erred in awarding the plaintiff alimony. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Spouse Held Dependent. —

Where plaintiff's budget of $2800 per month was both reasonable and commensurate with the standard of living which the couple maintained prior to the date of the separation, plaintiff had no income producing assets, but earned a net income of $1353 per month, and defendant's gross income was nearly four times that of plaintiff, these findings supported trial court's determination that plaintiff was a dependent spouse and that defendant was a supporting spouse. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

§ 50-16.1A. (For applicability see editor's note) Definitions.

Legal Periodicals. — For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

CASE NOTES

Quoted in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-16.2: (For continued applicability see editor's note) Repealed by Session Laws 1995, c. 319, s. 1, effective October 1, 1995.

Legal Periodicals. —

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For article, "Maintenance, Alimony, and the Rehabilitation of Family Care," see 71 N.C.L. Rev. 721 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

CASE NOTES

I. In General.
II. Adultery.
III. Abandonment.

I. IN GENERAL.

Lack of Grounds. — The plain and definite meaning of § 50-16.11 is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to § 50-15.2 exists, the trial court, in its discretion, may order recoupment of any alimony pendente lite paid by the supporting spouse. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Identification of Support Payments. — Whether support payments are in fact alimony does not depend on whether order refers to it as "alimony" but instead on whether support payments constitute "reciprocal consideration" for property settlement provision of order. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

Only Dependent Spouse Is Entitled to Alimony or Alimony Pendente Lite. — Only a dependent spouse is entitled to alimony in North Carolina. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

Post-Separation Failure to Provide Necessary Subsistence. — Absent a valid separation agreement waiving all alimony rights under § 50-16.6(b), post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. Brown v. Brown, 104 N.C. App. 547, 410 S.E.2d 223 (1991), cert. denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

Applied in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

Cited in Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

II. ADULTERY.

To determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Section Does Not Distinguish Between Pre-Separation and Post-Separation Adultery. — Until the State grants them an absolute divorce, a couple, though separated from each other, continues to be wife and husband; therefore, this section, which sets down the fault grounds for alimony, does not distinguish between pre-separation and post-separation adultery. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Sexual Intercourse with Third Party During Period of Separation Is Adultery. — Voluntary sexual intercourse by a spouse with a third party during the period of separation required by § 50-6 is adultery as contemplated by this section, and is a ground for alimony. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

III. ABANDONMENT.

Constructive abandonment may be shown by mental or physical cruelty or willful failure of the defaulting spouse to fulfill obligations of the marriage. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Proof of constructive abandonment may not be based on evidence of actions after the parties separated. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Findings of Trial Court Held Insufficient on Question of Abandonment. — The findings and conclusions of the trial court were held insufficient to resolve the question raised by the defendant as to whether the plaintiff did in fact abandon the defendant, either actually or constructively, and would therefore be vacated and remanded for more detailed findings and conclusions with respect to the defendant's claim for alimony. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

§ 50-16.2A. (For applicability see editor's note) Postseparation support.

Legal Periodicals. — For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

§ 50-16.3A. (For applicability see editor's note) Alimony.

Legal Periodicals. — For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

§ 50-16.4. (For applicability see note) Counsel fees in actions for alimony, postseparation support.

CASE NOTES

I. In General.

I. IN GENERAL.

Quoted in Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

§ 50-16.5: (For continued applicability see editor's note) Repealed by Session Laws 1995, c. 319, s. 1, effective October 1, 1995.

CASE NOTES

I. In General.
II. Basis of Award.

I. IN GENERAL.

Construction With Other Provisions. — Whether a spouse is substantially in need of maintenance and support as defined by former § 50-16.1(3) is determined by construing this statute in pari material with the terms of former § 50-16.5 which prescribed factors for the trial court to consider in determining the amount of alimony. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

Stated in Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

II. BASIS OF AWARD.

Custodial Spouse's Caregiving Obligations. — While North Carolina's alimony statute does not contain express language which specifically allows consideration of the custodial spouse's caregiving obligations to the minor children, this consideration is nonetheless consistent with the "'overriding principle'" of "'fairness'" which guides the determination of alimony, as well as the statutory provision contemplating regard of "other facts of the particular case." Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

Change in Financial Need or Dependency. — On a motion to modify or terminate an order of alimony, it is appropriate for the trial court to consider whether the dependent spouse's financial need or dependency has changed, as it relates to the factors listed in this section. Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

§ 50-16.6. (For applicability see note) When alimony, postseparation support, counsel fees not payable.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-16.7. (For applicability see note) How alimony and postseparation support paid; enforcement of decree.

Legal Periodicals. —

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

§ 50-16.8. (For applicability see note) Procedure in actions for postseparation support.

CASE NOTES

I. In General.

I. IN GENERAL.

A party may seek permanent alimony upon filing for a divorce from bed and board. Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

§ 50-16.9. (For applicability see note) Modification of order.

Legal Periodicals. —

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.
II. Change of Circumstances.

I. IN GENERAL.

Reconsideration of Alimony Improper in Modification Hearing. — It is not appropriate to reconsider, in a modification hearing, the dependent spouse's entitlement to alimony, as the entitlement issue was permanently adjudicated by the original order. Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

Upon a Showing of Changed Conditions. —

Although there is no requirement that the alimony be modified, upon a showing of changed circumstance, the trial court should consider, in its discretion, whether to modify the original decree of alimony. Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

II. CHANGE OF CIRCUMSTANCES.

Increase in Wife's Needs or Decrease in Estate. —

On a motion to modify or terminate an order of alimony, it is appropriate for the trial court to consider whether the dependent spouse's financial need, that is, dependency, as it relates to the factors in § 50-16.5, has changed. Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

§ 50-20. Distribution by court of marital property upon divorce.

(a) Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from

the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

(4) "Divisible property" means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

d. Increases in marital debt and financing charges and interest related to marital debt.

(c) There shall be an equal division by using net value of marital property and not value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. Factors the court shall consider under this subsection are as follows:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;

(2) Any obligation for support arising out of a prior marriage;

(3) The duration of the marriage and the age and physical and mental health of both parties;

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property;

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital prop-

erty by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;

(9) The liquid or nonliquid character of all marital property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party;

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.

(c1) Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital property of his or her spouse from a former marriage until a final determination of equitable distribution is made in the marital property of the spouse's former marriage.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the marital or separate property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.

Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation. (1981, c. 815, s. 1; 1983, c. 309; c. 640, ss. 1, 2; c. 758, ss. 1-4; 1985, c. 31, ss. 1-3; c. 143; c. 660, ss. 1-3; 1987, c. 663; c. 844, s. 2; 1991, c. 635, ss. 1, 1.1; 1991 (Reg. Sess., 1992), c. 960, s. 1; 1995, c. 240, s. 1; c. 245, s. 2; 1997-212, ss. 2-5; 1997-302, s. 1.)

Editor's Note. —

Session Laws 1997-302, s. 3, provides that the amendments to subsection (i1) of this section were effective October 1, 1997, and applicable to motions for interim distribution filed on or after that date, but shall apply to divisible property and divisible debt only in actions for equitable distribution filed on or after October 1, 1997; the remainder of the amendments by that act were effective October 1, 1997, and applicable to actions for equitable distribution filed on or after that date.

Effect of Amendments. — Session Laws 1997-212, ss. 2-5, effective October 1, 1997, and applicable to actions for equitable distribution filed on and after that date, in subdivision (b)(1) inserted "and nonvested" preceding "pension, retirement", and substituted "and vested and nonvested" for "including" near the end of the second sentence; in subdivision (b)(2) deleted the last sentence, which read "The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property"; in subdivision (b)(3) deleted the second through fifth paragraphs, concerning how benefits may be made payable, death of the recipient, court orders, and applicability of certain statutes; and in subdivision (c)(5) deleted "nonvested" following "The expectation of", and substituted "rights that are not marital property" for "rights, which is separate property".

Session Laws 1997-302, s. 1, effective October 1, 1997, inserted "and divisible property" twice in the introductory language of subsection (a); inserted "or divisible property" and "or (4)" in subdivision (b)(1); added subdivision (b)(4); in the introductory language of subsection(c) inserted "and net value of divisible property" and "and divisible property"; in subsection (e) added the first two sentences, in the third sentence substituted "presumption is rebutted" for "court determines that an equitable distribution of all or portions of the marital property in kind would be impractical", substituted "in-kind" for "such", and inserted "or divisible" in the fourth sentence; and rewrote subsection (i1). See Editor's Note for applicability of amendment.

Legal Periodicals. —

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

I. General Consideration.
II. Marital and Separate Property.
  A. In General.
  B. Marital Property Generally.
  C. Separate Property Generally.
  E. Pension and Retirement Benefits.
III. Distribution of Property.
  A. In General.
  B. Factors to Be Considered.
  C. Distributive Awards.
IV. Valuation of Property.
VI. Alimony and Child Support.

I. GENERAL CONSIDERATION.

Applied in Leighow v. Leighow, 120 N.C. App. 619, 463 S.E.2d 290 (1995).

Cited in Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996).

II. MARITAL AND SEPARATE PROPERTY.

A. In General.

Both legal and equitable interest in real and personal property are subject to distribution under this section. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996).

B. Marital Property Generally.

"Presently owned" defined. — "Presently owned" under subsection (b)(1) refers to the date of separation, not the date of trial. Wornom v. Wornom, — N.C. App. —, 485 S.E.2d 856 (1997).

Presumption of Use for Marital Purposes Overcome. — Findings, along with plaintiff's testimony that he was unaware that defendant was converting funds, and defendant's acknowledgment that she could not account for $150,000 she spent were sufficient to overcome the presumption that the withdrawal of funds was with plaintiff's consent and for marital purposes. Wornom v. Wornom, — N.C. App. —, 485 S.E.2d 856 (1997).

When a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996).

Property Subject to Bankruptcy Proceedings. — When a pending claim for equitable distribution concerns property whose status as marital is foreseeably a matter of some dispute, a former spouse cannot sit on her rights in bankruptcy, only to surface later and lay claim to that property after it had already been subjected to possible liquidation, attachment, or other manner of disposal. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

C. Separate Property Generally.

Gifts to Spouse. — In equitable distribution cases, gifts to a spouse from the other spouse may be classified as separate property under subsection (b)(2). Milner v. Littlejohn, — N.C. App. —, 484 S.E.2d 453 (1997).

The party seeking to show its separate nature must show by the preponderance of the evidence that the gift was given with such and intention. Milner v. Littlejohn, — N.C. App. —, 484 S.E.2d 453 (1997).

E. Pension and Retirement Benefits.

Interest in Military Pension Not Dischargeable in Bankruptcy. — Marital property interests in a debtor's military pension are not dischargeable in bankruptcy. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

III. DISTRIBUTION OF PROPERTY.

A. In General.

Only considerations which are just and proper within the meaning of subdivision (c)(12) of this section are those related to the marital economy. Burnett v. Burnett, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

B. Factors to Be Considered.

A spouse's contribution of his separate property to acquire property titled in the entireties, and classified as marital, qualifies as a distributional factor under subsection (c). Collins v. Collins, 125 N.C. App. 113, 479 S.E.2d 240 (1996).

A spouse's contribution of his separate property to the marital estate is a distributional factor under subdivision (c)(12). Collins v. Collins, 125 N.C. App. 113, 479 S.E.2d 240 (1996).

Loan Eligibility of Spouse. — Defendant's VA loan eligibility did not constitute distributable property for purposes of equitable distribution. Jones v. Jones, 121 N.C. App. 523, 466 S.E.2d 342 (1996).

Need of spouse to occupy the marital residence, unless it involves a spouse with custody of children, does not relate to the economic condition of the marriage and is not properly considered as a distributional factor under subdivision (c)(12) of this section. Burnett v. Burnett, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

A party's exclusive use of marital residence subsequent to date of separation is a relevant distributional factor. Burnett v. Burnett, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

Obligation to Care for Child. — The trial court erred by considering plaintiff's separate obligation to care for child as a distributional factor. Pott v. Pott, — N.C. App. —, 484 S.E.2d 822 (1997).

C. Distributive Awards.

Where escrow balance was not included in the trial court's net valuation of the marital home or otherwise considered in the order, the trial court erred by failing to properly distribute this asset. Pott v. Pott, — N.C. App. —, 484 S.E.2d 822 (1997).

IV. VALUATION OF PROPERTY.

Debts. — Trial court erred by failing to consider defendant's obligation on notes created to establish accounting firm and erred by finding defendant earned $120,000 a year without sufficient evidence. Pott v. Pott, — N.C. App. —, 484 S.E.2d 822 (1997).

VI. ALIMONY AND CHILD SUPPORT.

The phrase "children of both parties" The phrase "children of both parties" clearly includes any child, legitimate or illegitimate. Pott v. Pott, — N.C. App. —, 484 S.E.2d 822 (1997).

§ 50-20.1. Pension and retirement benefits.

(a) The award of vested pension, retirement, or other deferred compensation benefits may be made payable:

(1) As a lump sum by agreement;
(2) Over a period of time in fixed amounts by agreement;
(3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits; or
(4) By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.

(b) The award of nonvested pension, retirement, or other deferred compensation benefits may be made payable:

(1) As a lump sum by agreement;
(2) Over a period of time in fixed amounts by agreement; or
(3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the court shall not require the administrator of the fund or plan involved to make any payments until the party against whom the award is made actually begins to receive the benefits unless the plan permits an earlier distribution.

(d) The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.

(e) No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested and nonvested pension, retirement, or other deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation plan or fund is involved, but the benefits award may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a plan prohibits an award in excess of fifty percent (50%).

(f) In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary designation with the plan consistent with the terms of the plan unless the plan prohibits such designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan or fund involved.

(g) The court may require distribution of the award by means of a qualified domestic relations order, or as defined in section 414(p) of the Internal Revenue Code of 1986, or by other appropriate order. To facilitate the calculating and payment of distributive awards, the administrator of the system, plan, or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

(h) This section and G.S. 50-21 shall apply to all pension, retirement, and other deferred compensation plans and funds, including vested and nonvested military pensions eligible under the federal Uniform Services Former Spouses Protection Act, and including funds administered by the State pursuant to Articles 84 through 88 of Chapter 58 and Chapters 120, 127A, 128, 135, 143, 143B, and 147 of the General Statutes, to the extent of a member's accrued benefit at the date of separation, as determined by the court. (1997-212, s. 1.)

Editor's Note. — Session Laws 1997-212, s. 6, made this section effective October 1, 1997, and applicable to actions for equitable distribution filed on and after that date.

§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

(a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f). Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property. Within 30 days after service of the inventory affidavit, the party upon whom service is made shall prepare and serve an inventory affidavit upon the other party. The inventory affidavits prepared and served pursuant to this subsection shall be subject to amendment and shall not be binding at trial as to completeness or value. The court may extend the time limits in this subsection for good cause shown. The affidavits are subject to the requirements of G.S. 1A-1, Rule 11, and are deemed to be in the nature of answers to interrogatories propounded to the parties. Any party failing to supply the information required by this subsection in the affidavit is subject to G.S. 1A-1, Rules 26, 33, and 37. During the pendency of the action for equitable distribution, discovery may proceed, and the court shall enter temporary orders as appropriate and necessary for the purpose of preventing the disappearance, waste, or destruction of marital or separate property or to secure the possession thereof.

Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20, and the court may include in its order appropriate provisions to ensure compliance with the order of equitable distribution.

(b) For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.

(c) Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina.

(d) Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference. If that party fails to make application, then the other party may do so. At the conference the court shall determine a schedule of discovery as well as consider and rule upon any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and shall set a date for the disclosure of expert witnesses and a date on or before which an initial pretrial conference shall be held.

At the initial pretrial conference the court shall make inquiry as to the status of the case and shall enter a date for the completion of discovery, the completion of a mediated settlement conference, if applicable, and the filing and service of motions, and shall determine a date on or after which a final pretrial conference shall be held and a date on or after which the case shall proceed to trial.

The final pretrial conference shall be conducted pursuant to the Rules of Civil Procedure and the General Rules of Practice in the applicable district or superior court, adopted pursuant to G.S. 7A-34. The court shall rule upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

(e) Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:

(1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and

(2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted. (1981, c. 815, s. 6; 1983, c. 671, s. 1; 1985, c. 689, s. 21; 1987, c. 844, s. 1; 1991, c. 610, s. 2; 1991 (Reg. Sess., 1992), c. 910, s. 1; 1993, c. 209, s. 1; 1995, c. 244, s. 1; c. 245, s. 1; 1997-302, s. 2.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to actions for equitable distribution filed on or after that date, in subsection (b) added "and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties" and added the last sentence.

CASE NOTES

Bankruptcy. — Following the parties' separation, a spouse's right to equitable distribution does not create any vested rights in particular marital property, but rather creates in each spouse an unliquidated, unsecured, contingent claim as defined by federal law which may be discharged in bankruptcy. Justice v. Justice, 123 N.C. App. 733, 475 S.E.2d 225 (1996).

Cited in Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996).

ARTICLE 2.

Expedited Process for Child Support Cases.

§ 50-30. Findings; policy; and purpose.

(a) Findings. — The General Assembly makes the following findings:

(1) There is a strong public interest in providing fair, efficient, and swift judicial processes for establishing and enforcing child support obligations. Children are entitled to support from their parents, and court assistance is often required for the establishment and enforcement of parental support obligations. Children who do not receive support from their parents often become financially dependent on the State.

(2) The State shall have laws that meet the federal requirements on expedited processes for obtaining and enforcing child support orders for purposes of federal reimbursement under Title IV-D of the Social Security Act, 42 U.S.C. § 66(a)(2). The Secretary of the United States Department of Health and Human Services may waive the expedited process requirement with respect to one or more district court district as defined in G.S. 7A-133 on the basis of the effectiveness and timeliness of support order issuance and enforcement within the district.

(3) The State has a strong financial interest in complying with the expedited process requirement, and other requirements, of Title IV-D of the Social Security Act, but the State would incur substantial expense in creating statewide an expedited child support process as defined by federal law.

(4) The State's judicial system is largely capable of processing child support cases in a timely and efficient manner and has a strong commitment to an expeditious system.

(5) The substantial expense the State would incur in creating a new system for obtaining and enforcing child support orders would be reduced and better spent by improving the present system.

(b) Purpose and Policy. — It is the policy of this State to ensure, to the maximum extent possible, that child support obligations are established and enforced fairly, efficiently, and swiftly through the judicial system by means that make the best use of the State's resources. It is the purpose of this Article to facilitate this policy. The Administrative Office of the Courts and judicial officials in each district court district as defined in G.S. 7A-133 shall make a diligent effort to ensure that child support cases, from the time of filing to the time of disposition, are handled fairly, efficiently, and swiftly. The Administrative Office of the Courts and the State Department of Health and Human Services shall work together to improve procedures for the handling of child support cases in which the State or county has an interest, including all cases that qualify in any respect for federal reimbursement under Title IV-D of the Social Security Act. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 86; 1997-443, s. 11A.18.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, in subdivision (d)(2) inserted "United States" preceding "Department"; and in subsection (b) substituted "State Department of Health and Human Services" for "Department of Human Resources".

§ 50-33. Waiver of expedited process requirement.

(a) State to Seek Waiver. — The State Department of Health and Human Services, with the assistance of the Administrative Office of the Courts, shall vigorously pursue application to the United States Department of Health and Human Services for waivers of the federal expedited process requirement.

(b) Districts That Do Not Qualify. — In any district court district as defined in G.S. 7A-133 that does not qualify for a waiver of the federal expedited process requirement, an expedited process shall be established as provided in G.S. 50-34. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 87; 1997-443, s. 11A.19.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, in subsection (a) substituted "State" for "DHR" in the subsection catchline, substituted "State Department of Health and Human Services" for "Department of Human Resources", and inserted "United States" following "application to the".

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

Sec.
50A-15. Filing and enforcement of custody decree of another state.
50A-16. Registry of out-of-state custody decrees and proceedings.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

Evidence was insufficient to determine that it was in the child's best interest to have another state assume jurisdiction. Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995), appeal dismissed, 343 N.C. 128, 468 S.E.2d 795 (1996).

Cited in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989); Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996); Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 50A-2. Definitions.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Quoted in Beck v. Beck, 123 N.C. App. 629, 473 S.E.2d 789 (1996).

Cited in Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 50A-3. Jurisdiction.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline

jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Where an Indiana order, which awarded custody of child living in Indiana to mother, contained no findings of fact that Indiana was child's home state, or had been her home state within six months before the action was commenced, or that it was in her best interests for Indiana to assume jurisdiction because she had significant connection with the state, a North Carolina trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders; the Indiana court had not assumed jurisdiction over the custody determination of the child in substantial conformity with this Act. Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

Exercise of Jurisdiction Upheld. —

Where the minor child resided in North Carolina for about one year after birth, North Carolina was the only state where the parties and the minor child lived as a family unit and, although there are a number of witnesses that reside in New Hampshire, there are numerous other witnesses who reside in North Carolina, district court's order that North Carolina was the most appropriate and convenient forum was appropriate. Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

North Carolina court had emergency jurisdiction in custody matter where defendant father's family made numerous threats to abduct children and take them to Turkey. Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996).

Proper Determination of Home State. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Where children had lived in North Carolina continuously from March 1987 until March 1989 when custody action was filed except for the 10-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree and the plaintiff resided in North Carolina for the entire period, the trial court correctly determined that North Carolina was the home state, thereby meeting one of the bases of jurisdiction under this section. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Significant Connection. — Where children resided in North Carolina for all but ten months of the two-year period prior to this action and that plaintiff resided in North Carolina for the entire period, the children and plaintiff had a "significant connection" with North Carolina, and there was substantial evidence regarding the children's "present or future care, protection, training, and personal relationships" in North Carolina. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Applied in Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991).

Cited in In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-5. Service of notice.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993); Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996).

§ 50A-7. Inconvenient forum.

CASE NOTES

Forum Appropriate. — Where the trial court made 15 detailed findings of fact including findings that support was paid by the defendant in North Carolina, three of the four parties live in Wilmington, North Carolina, and the plaintiff was moving to Virginia allegedly to go to school, these findings were sufficient to show that North Carolina was a convenient forum for the continued exercise of jurisdiction. Wilson v. Wilson, 121 N.C. App. 292, 465 S.E.2d 44 (1996).

§ 50A-9. Information under oath to be submitted to the court.

CASE NOTES

This section requires that every party in a custody pleading must give information under oath regarding the children's present address, the places where they have lived within the last five years, and the names and present addresses of the persons with whom the children have lived during that period. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Proper Exercise of Jurisdiction Despite Noncompliance with Oath Requirements. — Court of appeals declined to accept plaintiff's argument that failure to comply fully with this section's oath requirements defeated the court's subject matter jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

Failure to Attempt Service. — Where there was no attempt to serve other parent with notice of a Tennessee temporary custody hearing and she in fact never received notice of the hearing, the Tennessee court did not act substantially in conformity with this Chapter, and the order made by the Tennessee court was jurisdictionally defective. Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

Georgia's version of the Uniform Child Custody Jurisdiction Act (UCCJA) conforms to North Carolina's version. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Proper Exercise of Jurisdiction and Modification of Custody Decree. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-15. Filing and enforcement of custody decree of another state.

(a) An exemplified copy or a certified true copy of a custody decree of another state may be filed in the office of the clerk of any superior court of this State. The clerk shall treat the decree in the same manner as a custody decree of a court of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or such party's witnesses. (1979, c. 110, s. 1; 1997-81, s. 1.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, added "or a certified true copy" preceding "of a custody" in subsection (a).

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

§ 50A-16. Registry of out-of-state custody decrees and proceedings.

The clerk of each superior court shall maintain a registry in which the clerk shall enter the following:

(1) Exemplified and certified true copies of custody decrees of other states received for filing;

(2) Communications as to the pendency of custody proceedings in other states;

(3) Communications concerning a finding of inconvenient forum by a court of another state; and

(4) Other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding. (1979, c. 110, s. 1; 1997-81, s. 2.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, in the introductory language substituted "the clerk" for "he" following "registry in which", and in subdivision (1) added "and certified true" near the beginning.

§ 50A-20. Assistance to courts of other states.

CASE NOTES

Court erred in authorizing law enforcement officers to pick up children who were residing with petitioner and deliver them to respondent in an effort to assist Georgia court in enforcing its custody order; while trial court could have resorted to traditional contempt proceedings, there was no statutory basis for invoking the participation of law enforcement officers in producing the children. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Chapter 50B.

Domestic Violence.

Sec.
50B-1. Domestic violence; definition.
50B-2. Institution of civil action; motion for emergency relief; temporary orders.

Sec.
50B-4.1. Violation of valid protective order a misdemeanor.

§ 50B-1. Domestic violence; definition.

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

(b) For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship. (1979, c. 561, s. 1; 1985, c. 113, s. 1; 1987, c. 828; 1987 (Reg. Sess., 1988), c. 893, ss. 1, 3; 1995 (Reg. Sess., 1996), c. 591, s. 1; 1997-471, s. 1.)

Effect of Amendments. —
The 1997 amendment, effective December 1, 1997, and applicable to offenses committed on or after that date, substituted "personal" for "familial" in the introductory language of subsections (a) and (b); in subsection (b), rewrote subdivision (3), which read "Are parents, grandparents, or others acting in loco parentis to a minor child, or children and grandchildren", added subdivisions (5) and (6), and made a minor punctuation change.

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders.

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter.

(b) Emergency Relief. — A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served, upon payment of the required service fees.

(c) Ex Parte Orders. — Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter such orders as it deems necessary to protect the aggrieved party or minor children from such acts provided, however, that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse. Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county. Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served, upon payment of the required service fees.

(c1) Ex Parte Orders by Authorized Magistrate. — The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter such orders as it deems necessary to protect the aggrieved party or minor children from such acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of bodily injury or sexual abuse. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge within 72 hours of the filing for relief under this subsection, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever occurs first. A party who has paid court costs due for seeking an order from the magistrate under this subsection shall not be liable for court costs for a hearing before the district court judge scheduled and heard pursuant to an order entered by the magistrate under this subsection. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

(c2) The authority granted to authorized magistrates to award temporary child custody to pursuant subsection (c1) of this section and pursuant to G.S. 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms. — The clerk of superior court of each county shall provide to pro se complainants all forms which are necessary or appropriate to enable them to proceed pro se pursuant to this section. The Clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section. (1979, c. 561, s. 1; 1985, c. 113, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 893, s. 2; 1989, c. 461, s. 1; 1994, Ex. Sess., c. 4, s. 1; 1997-471, s. 2.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, deleted "the clerk of superior court is not available", preceding "the district court is not in session" in the second sentence of subsection (c1), and made a minor punctuation change.

§ 50B-4.1. Violation of valid protective order a misdemeanor.

A person who knowingly violates a valid protective order entered pursuant to this Chapter shall be guilty of a Class A1 misdemeanor. (1997-471, s. 3; 1997-456, s. 27.)

Editor's Note. — Session Laws 1997-471, s. 4, provides this section becomes effective December 1, 1997.

Session Laws 1997-471, s. 3, enacted this section as § 50B-4A. It has been redesignated as § 50B-4.1 pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Chapter 51.

Marriage.

Article 1.

General Provisions.

Sec.
51-1.2. Marriages between persons of the same gender not valid.
51-2. Capacity to marry.

Article 2.

Marriage Licenses.

51-7. Penalty for solemnizing without license.
Sec.
51-8. (Effective until June 30, 1998) License issued by register of deeds.
51-9 through 51-13. [Repealed.]
51-12. [Repealed.]
51-13. [Repealed.]
51-15. Obtaining license by false representation misdemeanor.
51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

CASE NOTES

Applied in State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990).

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

CASE NOTES

Where marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354, cert. denied, 313 N.C. 599, 332 S.E.2d 178 (1985).

§ 51-1.2. Marriages between persons of the same gender not valid.

Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina. (1995 (Reg. Sess., 1996), c. 588, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 588, s. 2, made this section effective upon ratification. The Act was ratified June 20, 1996.

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 56 of Chapter 7A or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(b) When an unmarried female who is more than 12 years old, but less than 18 years old, is pregnant or has given birth to a child and such unmarried female and the putative father of the child, either born or unborn, shall agree to marry, and consent in writing to such marriage, as set out in subsection (a), subdivisions (1), (2), (3) or (4) above, or by the director of social services of the county of residence of either party, is given on the part of the female, the register of deeds is authorized to issue to said parties a license to marry, and it shall be lawful for them to marry in accordance with the provisions of this Chapter.

(c) When a license to marry is procured by or on behalf of any person under 18 years of age by fraud or misrepresentation, a parent or person standing in loco parentis to such person under 18 years of age shall be a proper party plaintiff in an action to annul said marriage. (R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608.)

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Bigamous Marriages Are Void. — A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Wife who knowingly entered a bigamous marriage was subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct; therefore, the trial court correctly terminated husband's obligation to pay alimony under the separation agreement. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Applied in Heiser v. Heiser, 71 N.C. App. 223, 321 S.E.2d 479 (1984).

ARTICLE 2.

Marriage Licenses.

§ 51-7. Penalty for solemnizing without license.

Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars ($200.00) to any person who sues therefor, and he shall also be guilty of a Class 1 misdemeanor. (R.C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C.S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5; 1993, c. 539, s. 415; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 415, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 51-8. (Effective until June 30, 1998) License issued by register of deeds.

Every register of deeds shall, upon proper application, issue a license for the marriage of any two persons if it appears that such persons are authorized to be married in accordance with the laws of this State. In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for the license to marry to present certified copies of birth certificates or birth registration cards provided for in G.S. 130-73, or such other evidence as the register of deeds deems necessary to such determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State. Each applicant for a marriage license shall provide on the application the applicant's social security number. The register of deeds shall not issue a marriage license unless all of the requirements of this section have been met. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C.S., s. 2500; 1957, c. 506, s. 1; 1967, c. 957, s. 2; 1997-433, s. 4.5.)

Section Effective Until June 30, 1998. — The section above is effective until June 30, 1998. For the section effective June 30, 1998, see the main pamphlet.

Editor's Note. —
Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, added the last two sentences.

§§ 51-9 through 51-11: Repealed by Session Laws 1994, c. 647, ss. 1-3, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6 provides that ss. 1 to 3, which repealed these sections, apply to marriage license applications filed on or after that date.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27, effective January 1, 1986.

§ 51-13: Repealed by Session Laws 1994, c. 647, s. 4, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6, provides that s. 4, which repealed this section, applies to marriage license applications filed on or after that date.

The repealed section was amended by Session Laws 1993, c. 539, s. 416, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. The section is set out above as repealed.

§ 51-15. Obtaining license by false representation misdemeanor.

If any person shall obtain a marriage license by misrepresentation or false pretenses, he shall be guilty of a Class 3 misdemeanor. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4; 1993, c. 539, s. 417; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 417, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

(a) When it shall appear to the register of deeds of any county in this State that the names of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name and names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction.

(b) When the name of a party to a marriage has been changed by court order as the result of a legitimation action or other cause of action, and the party whose name is changed present a signed affidavit to the register of deeds indicating the name change and requesting that the application for a marriage license, the marriage license, and the marriage certificate of the officiating officer be amended by substituting the changed name for the original name, the register of deeds may amend the records as requested by the party, provided the other party named in the records consents to the amendment. (1953, c. 797; 1959, c. 344; 1987, c. 576.)

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.
52-11. Antenuptial contracts and torts.

§ 52-1. Property of married persons secured.

CASE NOTES

Conveyance of Separate Property. — Where a married person conveys separate property without permission or joinder of the spouse and the non-owner spouse survives the owner spouse, the conveyed property is subject to the non-owner spouse's elective life estate. Melvin v. Mills-Melvin, — N.C. App. —, 486 S.E.2d 84 (1997).

§ 52-2. Capacity to contract.

Legal Periodicals. —
For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

I. In General.

I. IN GENERAL.

Conveyance of Separate Property. — Where a married person conveys separate property without permission or joinder of the spouse and the non-owner spouse survives the owner spouse, the conveyed property is subject to the non-owner spouse's elective life estate. Melvin v. Mills-Melvin, — N.C. App. —, 486 S.E.2d 84 (1997).

§ 52-3. Married person may insure spouse's life.

CASE NOTES

Insurable Interest in Spouse's Life. — This section does not create in a wife an insurable interest in the life of her husband. She has such an interest without the benefit of the section. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991).

Right to Insure Spouse's Life Without Consent. — This section gives married persons the right to insure their spouses' lives without their consent. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991), distinguishing Acme Mfg. Co. v. McCormick, 175 N.C. 277, 95 S.E. 555 (1918).

§ 52-4. Earnings and damages.

Legal Periodicals. —
For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

§ 52-5. Torts between husband and wife.

Legal Periodicals. — For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

Marriage does not automatically preclude an action for trespass. Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350 (1996).

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

CASE NOTES

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Construction With Other Provisions. — This section and § 52-10.1 are distinguishable in that a separation agreement may affect support rights whereas this section refers only to "rights ... in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under this section may be entered into at any time during marriage, not only in contemplation of separation or divorce. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Those contracts between spouses which conflict with public policy are void. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of § 52-10.1, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

§ 52-10.1. Separation agreements.

Legal Periodicals. — For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

For article, "Bromhal v. Stott: Revisiting the Court's Role in Separation Agreements in the Context of Attorneys' Fees," see 74 N.C.L. Rev. 2151 (1996).

CASE NOTES

Construction With Other Sections. — Section 52-10 and this section are distinguishable in that a separation agreement may affect support rights whereas § 52-10 refers only to "rights ... in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under § 52-10 may be entered into at any time during marriage, not only in contemplation of separation or divorce. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Separation Agreements Binding. — Under this section separation agreements are binding in all respects so long as they are not inconsistent with public policy and parties may, in settling disputes, agree to the payment of attorney's fees. Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994), petition denied as to additional issues, 339 N.C. 609, 454 S.E.2d 246, aff'd, 341 N.C. 702, 462 S.E.2d 219 (1995).

Presumption of Validity of Acknowledgment. — To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of this section, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

Attorneys Fees. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Provision for recovery of attorney's fees in separation agreement was not inconsistent with public policy and was legal, valid, and binding under this section. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Separation Agreement Not Shown. — Where document recited that on the date of execution, the parties were "living separate and apart", however, it further provided that the parties may desire to resume cohabitation in an effort to reconcile and that the parties were considering the resumption of cohabitation, the express and unambiguous language of the agreement declared that the parties were not contemplating living "separate and apart forever." Thus, the agreement was not a separation agreement under this section. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Cited in Moyer v. Moyer, 122 N.C. App. 723, 471 S.E.2d 676 (1996).

§ 52-10.2. Resumption of marital relations defined.

CASE NOTES

There are two lines of cases regarding resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element; these two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Future, but Not Existing, Alimony Obligations Cease upon Reconciliation. — When the parties resumed marital relations, appellant's obligations to pay alimony in the future ceased. His duty under the consent judgment to pay alimony up to the date of reconciliation, however, as an executed portion of the consent judgment, remained enforceable through the court's contempt power. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Reconciliation Not Shown. — Four hours on each of six evenings spent together in the former marital home eating dinner and visiting with the parties' children in combination with three or four isolated acts of sexual intercourse did not constitute reconciliation as a matter of law. Fletcher v. Fletcher, 123 N.C. App. 744, 474 S.E.2d 802 (1996).

Cited in Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350 (1996).

§ 52-11. Antenuptial contracts and torts.

The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C.S., s. 2517; 1965, c. 878, s. 1.)

Editor's Note. —

This section has been set out above, as it was inadvertently omitted from the main pamphlet.

Legal Periodicals. —

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

Chapter 52B.

Uniform Premarital Agreement Act.

Sec.
52B-7. Enforcement.

Editor's Note. — The official commentary to this Act has been printed in the main volume through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Act may be ordered from them at 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.

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§ 52B-1. Short title.

Legal Periodicals. — For article, "North Carolina's Uniform Premarital Agreement Act, A Contract Perspective," see 12 Campbell L. Rev. 221 (1990).

For comment, "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," see 28 Wake Forest L. Rev. 1037 (1993).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

§ 52B-2. Definitions.

CASE NOTES

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-3. Formalities.

CASE NOTES

Acknowledgment Not Required. — The Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

§ 52B-4. Content.

Legal Periodicals. — For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

§ 52B-6. Amendment, revocation.

CASE NOTES

A cancellation of wedding plans does not automatically nullify the provisions of a prenuptial agreement in the event the parties subsequently reconcile and marry. In re Estate of Pate, 119 N.C. App. 400, 459 S.E.2d 1 (1995).

§ 52B-7. Enforcement.

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) That party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. Before the court orders support under this subsection, the court must find that the party for whom support is ordered is a dependent spouse, as defined by G.S. 50-16.1A, and that the requirements of G.S. 50-16.2A regarding postseparation support or G.S. 50-16.3A regarding alimony have been met.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law. (1987, c. 473, s. 1; 1995, c. 319, s. 11; 1997-456, s. 27.)

Cross References. — As to postseparation support, see § 50-16.2A.

Editor's Note. — Subdivisions (a)(2)(i) through (a)(2)(iii) were redesignated as (a)(2)a. through (a)(2)c. pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

— Session Laws 1995, c. 319, which amended this section, in s. 12, provides: "This act shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995."

CASE NOTES

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in

a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Party Claiming Invalidity Has Burden of Proof. — In an action to enforce a premarital agreement executed prior to enactment of Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Presentation of a premarital agreement to wife on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, did not amount to duress and undue influence. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Premarital Agreement Was Not Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Foreign Contract. — Syrian contract would not be viewed as a premarital agreement limiting plaintiff's relief under the laws of North Carolina because the contract, signed by plaintiff's father as her agent, did not meet the requirements of this chapter. Atassi v. Atassi, 117 N.C. App. 506, 451 S.E.2d 371, cert. denied, 340 N.C. 109, 456 S.E.2d 310 (1995).

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-9. Limitation of actions.

CASE NOTES

Cited in Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989).

Chapter 52C.

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Article 5.

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Article 5.

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52C-5-502. (Effective until June 30, 1998) Employer's compliance with income-withholding order of another state.

52C-5-503. (Expires June 30, 1998) Compliance with multiple income-withholding orders.

52C-5-504. (Expires June 30, 1998) Immunity from civil liability.

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Article 6.

Enforcement and Modification of Support Order After Registration.

Part 1. Registration and Enforcement of Support Order.

52C-6-601. (Effective until June 30, 1998) Registration of order for enforcement.

52C-6-602. Procedure to register order for enforcement.

Part 2. Contest of Validity of Enforcement.

52C-6-605. (Effective until June 30, 1998) Notice of registration of order.

52C-6-606. (Effective until June 30, 1998) Procedure to contest validity or enforcement of registered order.

Part 3. Registration and Modification of Child Support Order.

52C-6-611. (Effective until June 30, 1998) Modification of child support order of another state.

52C-6-613. (Expires June 30, 1998) Jurisdiction to modify child support order of another state when individual parties reside in this State.

52C-6-614. (Expires June 30, 1998) Notice to issuing tribunal of modification.

ARTICLE 1.

General Provisions.

§ 52C-1-101. (Effective until June 30, 1998) Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "Child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent.

(2) "Child support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state.

(3) "Duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support.

(4) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six-months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(5) "Income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of this State.

(6) "Income-withholding order" means an order or other legal process directed to a payer of income to withhold support from the income of the obligor.

(7) "Initiating state" means a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state under this Act or a law or procedure substantially similar to this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(8) "Initiating tribunal" means the authorized tribunal in an initiating state.

(9) "Issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage.

(10) "Issuing tribunal" means the tribunal that issues a support order or renders a judgment determining parentage.

(11) "Law" includes decisional and statutory law and rules and regulations having the force of law.

(12) "Obligee" means:

  a. An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;

  b. A state or political subdivision to which the rights under a duty of support or support order have been assigned

§ 52C-1-101 has a delayed effective date. See notes.

or which has independent claims based on financial assistance provided to an individual obligee; or

c. An individual seeking a judgment determining parentage of the individual's child.

(13) "Obligor" means an individual, or the estate of a decedent:

a. Who owes or is alleged to owe a duty of support;

b. Who is alleged but has not been adjudicated to be a parent of a child; or

c. Who is liable under a support order.

(14) "Register" means to file a support order or judgment determining paternity in the appropriate location for the recording or filing of foreign judgments generally or foreign support orders specifically.

(15) "Registering tribunal" means a tribunal in which a support order is registered.

(16) "Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this Act or a law or procedure substantially similar to this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(17) "Responding tribunal" means the authorized tribunal in a responding state.

(18) "Spousal-support order" means a support order for a spouse or former spouse of the obligor.

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:

a. An Indian tribe; and

b. A foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(20) "Support enforcement agency" means a public official or agency authorized to seek:

a. Enforcement of support orders or duties of support;

b. Establishment or modification of child support;

c. Determination of parentage; or

d. To locate obligors or their assets.

(21) "Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrears, or reimbursement, and may include related costs and fees, interest, income withholding, attorneys' fees, and other relief.

(22) "Tribunal" means a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine paternity, except that, for matters heard in this State, tribunal means the General Court of Justice, District Court Division. (1995, c. 538, s. 7(c); 1997-433, s. 10; 1997-456, s. 27.)

OFFICIAL COMMENT

Twenty-two terms are defined in UIFSA as compared with the parallel RURESA § 2, which had fourteen entries. Many crucial definitions continue to be left to local law. For example, the definitions of "child" and "child-support order" provided by subsections (1) and (2) refer to "the age of majority" without further elaboration. The exact age at which a child becomes an adult for different purposes is a matter for the law of each State, as is the age at which a parent's duty to furnish child support terminates. Similarly, a wide variety of other terms of art are implicitly left to state law. For example, subsection (21) refers inter alia to "health care, arrearages, or reimbursement ...." All of these terms are subject to individualized definitions on a state-by-state basis.

Subsection (3) defines "duty of support" to mean the legal obligation to provide support before it has been reduced to judgment. This broad definition includes both prospective and retrospective obligations to the extent they are imposed by the relevant state law.

In order to resolve certain conflicts in the exercise of jurisdiction, for limited purposes subsection (4) borrows the concept of the "home State of a child" from the Uniform Child Custody Jurisdiction Act (UCCJA), versions of which have been adopted in all 50 States, and incorporated into the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A (PKPA).

Subsection (6) is written broadly so states that direct income withholding by an obligor's employer based on "other legal process," as distinguished from an order of a tribunal, may have that legal process recognized as an income-withholding order. Federal law requires that each State provide for income withholding "without the necessity of any application therefor, or for any further action by the court or other entity which issued such order ...." 42 U.S.C. § 666(b)(2). States have complied with this directive in a variety of ways. For example, at the time UIFSA was originally drafted New York provided a method for obtaining income withholding of court-ordered support by authorizing an attorney, clerk of court, sheriff or agent of the child support enforcement agency to serve upon the defaulting obligor's employer an "income execution for support enforcement." New York McKinney's C.P.L.R. 5241. This "other legal process" reportedly was the standard method for obtaining income withholding in that State, while the statutory provision for an income-withholding order, C.P.L.R. 5242, was rarely used by either the courts or the litigants.

Subsections (7) and (8) define "initiating State" and "initiating tribunal" similarly to RURESA § 2(d). It is important to note, however, that UIFSA permits the direct filing of an interstate action in the responding State without an initial filing in an initiating tribunal. Thus, in addition to the traditional resort to a local "initiating tribunal," a petitioner in one State may seek to establish a support order in a second State by either filing in the responding state's tribunal or by directly seeking the assistance of the support enforcement agency in the second State.

The relationship between UIFSA and the prior Uniform Acts is captured in the phrasing of subsection (7), and repeated several times throughout the Act. *See, i.e.*, subsections (16) and (19). The Act declares that URESA and RURESA are compatible with UIFSA, and the new Act is designed to function with the earlier Acts without conflict. Support orders issued under one of the earlier Acts should be honored and enforced in any State with any of the three Uniform Acts. But, despite their common roots, neither URESA nor RURESA can be said to be "substantially similar" to the one-order system established in UIFSA. States enacting UIFSA are directed to accord full enforcement remedies to support orders from those States, but also to apply UIFSA restraint regarding modification, and to apply its "one-order" rule to orders from non-UIFSA States, *infra*.

The term "obligee" in subsection (12) is defined in a broad manner similar to RURESA § 2(f), which is consistent with common usage. In instances of spousal support, the person owed the duty of support and the person receiving the payments are almost always the same. Use of the term is more complicated in the context of a child support order. The child is the person to whom the duty of support is owed, and therefore can be viewed as the ultimate obligee. However, "obligee" usually refers to the individual receiving the payments. While this is most commonly the custodial parent or other legal custodian, the "obligee" may be a support enforcement agency that has been assigned the right to receive support payments in order to recoup Temporary Assistance for Needy Families (TANF), 42 U.S.C. § 601 et seq., formerly known as Aid to Families with Dependent Children (AFDC). Even in the absence of such an assignment, a State may have an independent statutory claim for reimbursement for general assistance provided to a spouse, a former spouse, or a child of an obligor. The Act also uses "obligee" to identify an individual who is asserting a claim for support, not just for a person whose right to support is unquestioned, presumed, or has been established in a legal action.

Subsection (13) provides the correlative definition of an "obligor," which includes an individual who is alleged to owe a duty of support as well as a person whose obligation has previously been determined.

The definitions of "responding State" and "responding tribunal" in subsections (16) and (17) accommodate the direct filing of a petition under UIFSA without the intervention of an initiating tribunal. Both definitions acknowledge the possibility that there may be a responding State or tribunal in a situation where there is no initiating State or tribunal.

Subsection (19) withdraws the requirement of reciprocity between the several States and other U.S. jurisdictions formerly demanded by RURESA and URESA. A State need not enact UIFSA for support orders issued by its tribunals to be enforced by other States. Public policy favoring such enforcement is sufficiently strong to warrant waiving any quid pro quo among the States. This provision will be mooted by the likelihood that all States will enact UIFSA by January 1, 1998, as mandated by Congress in its 1996 welfare reform. In the original promulgation of UIFSA, the language of subsection (19) was somewhat ambiguous regarding the necessity of extending reciprocity to an Indian tribe and to foreign jurisdictions. By reorganizing the statutory language, the 1996 amendment clarifies that reciprocity is not required between the several States and Indian tribes. Further, the additional language and reorganization in subsection (19)(ii) makes clear that in this instance UIFSA follows the pattern of RURESA to require that a foreign nation must have substantially similar law or procedures to either UIFSA, RURESA, or URESA (that is, reciprocity) in order for its support orders to be treated as if they had been issued by a sister State. This is sharply different from the rule for States; amended UIFSA 1996 recognizes that in international relations the concept of reciprocity is crucial to acceptance of child support orders by other nations.

Subsection (20), "Support Enforcement Agency," includes the state IV-D agency (Part IV-D, Social Security Act, 42 U.S.C. § 651 et seq.), and other state or local governmental entities charged with establishing or enforcing support.

Subsection (22) introduces a completely new term, "tribunal," which replaces the term "court" used in RURESA. With the advent of federally-funded IV-D programs, a number of States have delegated various aspects of child support establishment and enforcement to quasi-judicial bodies and administrative agencies. UIFSA adopts the term "tribunal" to account for the breadth of state variations in dealing with support orders. Unless expressly noted otherwise, throughout the Act the term refers to a tribunal of the enacting State. To avoid confusion, however, when actions of tribunals of the enacting State and another State are contrasted in the same section or subsection, the phrases "tribunal of this State" and "tribunal of another State" are used for the sake of clarity.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, ss. 11 and 11.1, effective October 1, 1997 and expiring June 30, 1998, provide that the Attorney General shall explore the feasibility of filing suit against the United States Government to challenge its authority to require states to conform with the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and shall report findings and recommendations to the 1997 General Assembly, Regular Session 1998. They also provide that the Department of Human Resources apply to the United States Department of Health and Human Services for an exemption from implementing a provision requiring that the parties to an action to establish paternity not be entitled to a trial by jury, and that the Department report to the 1997 General Assembly, Regular Session 1998, on the status of the application for exemption.

Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Subdivisions (12)(i), (12)(ii), (12)(iii), (13)(i), (13)(ii), and (13)(iii) of this section were renumbered as subdivisions (12)a., (12)b., (12)c., (13)a., (13)b., and (13)c., respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, in subdivision (7) substituted "from which a proceeding is forwarded on in which a proceeding is filed for forwarding to a responding state" for "in which a proceeding", inserted "or procedure", and deleted "is filed for forwarding to a responding state" from the end; in subdivision (16) substituted "in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state" for "to which a proceeding is forwarded", inserted "or procedure"; in subdivision (19) substituted "Puerto Rico, the United States Virgin Islands" for "the Commonwealth of Puerto Rico", deleted "'state'" preceding "includes", added the subdivision (19)a. and (19)b. designations, deleted "includes" from the end of subdivision (19)a., and in subdivision (19)b. inserted "enacted a law or" and substituted "Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act" for "Chapter"; and rewrote subdivision (20).

§ 52C-1-102. District court has jurisdiction under this Act.

OFFICIAL COMMENT

The enacting State must identify the court, administrative agency, or the combination of those entities, which constitute the tribunal or tribunals authorized to deal with family support. In a particular State there may be several different such entities authorized to determine family support matters.

§ 52C-1-103. Remedies.

OFFICIAL COMMENT

The existence of procedures for interstate establishment, enforcement, or modification of support or a determination of parentage in UIFSA does not preclude the application of the general law of the forum. Even if the parents live in different States, for example, a petitioner may decide to file an original action for child support (and most likely for other relief as well) directly in the State of residence of the respondent and proceed under that forum's generally applicable support law. In so doing, the petitioner thereby submits to the personal jurisdiction of the forum and foregoes reliance on UIFSA. Once a child support order has been issued, this option is no longer available to interstate parties. Under UIFSA, a State may not permit a party to proceed to obtain a second support order; rather, in further litigation the tribunal must apply the Act's provisions for enforcement of an existing order and limit modification to the strict standards of UIFSA.

ARTICLE 2.

Jurisdiction.

Part 1. Extended Personal Jurisdiction.

§ 52C-2-201. Bases for jurisdiction over nonresident.

OFFICIAL COMMENT

Sections 201 and 202 assert what is commonly described as long-arm jurisdiction over a nonresident respondent for purposes of establishing a support order or determining parentage. Inclusion of this long-arm provision in this interstate Act is justified because residents of two separate States are involved in the litigation, both of whom are subject to the personal jurisdiction of the forum. Thus, the case has a clear interstate aspect, despite the fact that only the law of the forum State is applicable. Moreover, this is sufficient to invoke additional UIFSA provisions in an otherwise intrastate lawsuit. *See* Sections 202, 316, and 318, *infra*. The intent is to insure that every enacting State has a long-arm statute as broad as constitutionally permitted. In situations in which the long-arm statute can be satisfied, the petitioner (either the obligor or the obligee) has two options: (1) utilize the long-arm statute to obtain personal jurisdiction over the respondent; or (2) initiate a two-state action under the succeeding provisions of UIFSA seeking to establish a support order in the respondent's State of residence. Of course, a third option is available that does not implicate UIFSA; a petitioner may file a suit in the respondent's State of residence (perhaps to settle all issues between the parties in a single proceeding).

This long-arm statute applies to an order for spousal support as well as for child support. However, almost all of the specific provisions relate to child support orders or determinations of parentage. This accords with the fact that very few States have chosen to enact specific domestic relations long-arm statutes and that the focus of UIFSA is primarily on child support. Only subsections (1), (2) and (8) are applicable to an action for spousal support asserting long-arm jurisdiction over a nonresident. The first two subsections are wholly noncontroversial insofar as an assertion of personal jurisdiction is concerned. Moreover, assertion of personal jurisdiction under subsections (1), (2), or (8) will doubtless yield jurisdiction over all matters to be decided between the spouses, including division of property on divorce. Thus, the most obvious basis for asserting long-arm jurisdiction over spousal support, *i.e.*, "last matrimonial domicile," is not included in Section 201 to avoid the potential problem of another instance of bifurcated jurisdiction. That is, a situation is not created in which a tribunal is authorized to order a nonresident to pay spousal support, but may not personally bind the nonresident to a property division on divorce.

Under RURESA, multiple support orders affecting the same parties were commonplace. UIFSA creates a structure designed to provide for only one support order at a time. The new one-order regime is facilitated and combined with a broad assertion of personal jurisdiction under this long-arm provision. The frequency of a two-state procedure involving the participation of tribunals in both States should be substantially reduced by the introduction of this long-arm statute.

Subsections (1) through (8) are derived from a variety of sources, including the Uniform Parentage Act § 8, Texas Family Code § 102.011, and New York Family Court Act § 154.

Subsection (1) codifies the holding of *Burnham v. Superior Court*, 495 U.S. 604 (1990), which reaffirms the constitutional validity of asserting personal jurisdiction based on personal service within a State.

Subsection (2) expresses the principle that a nonresident party concedes personal jurisdiction by seeking affirmative relief or by submitting to the jurisdiction by answering or entering an appearance. However, the power to assert jurisdiction over a support issue under the Act does not extend the tribunal's jurisdiction to other matters.

Subsections (3) through (6) identify specific fact situations justifying the assertion of long-arm jurisdiction over a nonresident. Each provides an appropriate affiliating nexus for such an assertion, when judged on a case-by-case basis with an eye on procedural and substantive due process. Further, each subsection does contain a possibility that an overly literal construction of the terms of the statute will overreach due process. For example, subsection (3) provides that long-arm jurisdiction to establish a support order may be asserted if "the individual resided with the child in this State." The typical scenario contemplated by the statute is that the parties lived as a family unit in the forum State, separated, and one of the parents subsequently moved to another State while the other parent and the child continued to reside in the forum. No time frame is stated for filing suit; this is based on the fact that the absent parent has a support obligation that extends for at least the minority of the child (and often longer in many States). On the other hand, suppose that the two parents and their child lived in State A for many years, and then decided to move the family to State B to seek better employment opportunities. Those opportunities did not materialize and, after several weeks or a few months of frustration with the situation, one of the parents returned with the child to State A. Under these facts a tribunal of State A may conclude it has long-arm jurisdiction to establish the support obligation of the absent parent. But, suppose that the family's sojourn in State B lasted for many years, and one parent unilaterally decides to return to State A. Many, and perhaps all, tribunals will conclude that assertion of personal jurisdiction over the absent parent immediately after the return based on subsection (3) would offend due process. The interstate provisions of UIFSA are available to the returning parent to establish child support. Note that State B will have long-arm jurisdiction to establish support under Section 201. *See also* Section 204, *infra*, for the resolution of simultaneous proceedings provided by the Act.

The factual situations catalogued in the first seven subsections are appropriate and constitutionally acceptable grounds upon which to exercise personal jurisdiction over an individual. Subsection (7) is bracketed because not all States maintain putative father registries.

Finally, subsection (8) tracks the broad, catch-all provisions found in many state statutes, including California, Civ. P. Code § 410.10 (1973); New York, *supra*; and Texas, *supra*. Note, however, that the California provision, standing alone, was found to be inadequate to sustain a child support order under the facts presented in *Kulko v. Superior Court of California for San Francisco*, 436 U.S. 84 (1978).

§ 52C-2-202. Procedure when exercising jurisdiction over nonresident.

OFFICIAL COMMENT

Assertion of long-arm jurisdiction over a nonresident essentially results in a one-state proceeding, notwithstanding the fact that the parties reside in different States. With two exceptions, the provisions of UIFSA — labeled an interstate act — are not applicable to such a proceeding. To facilitate interstate exchange of information and to enable the nonresident to participate as fully as possible in the proceedings without the necessity of personally appearing in the forum State, Section 202 expressly incorporates two special UIFSA sections to long-arm cases. The first exception allows the tribunal to apply the special rules of evidence and procedure of Section 316 in order to facilitate decision-making when one party resides in another State, even though that party is subject to the personal jurisdiction of the tribunal. The same consideration accounts for the second exception; the two-state discovery procedures of Section 318 are applicable to a one-state proceeding when a foreign tribunal can assist in that process. In all other situations, the substantive and procedural law of the forum State applies. In sum, a one-state UIFSA case may utilize those two-state procedures which forward the interests of economy, efficiency, and fair play.

Part 2. Proceedings Involving Two or More States.

§ 52C-2-203. (Effective until June 30, 1998) Initiating and responding tribunal of state.

Under this Chapter, a tribunal of this State may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state. (1995, c. 538, s. 7(c); 1997-433, s. 10.1.)

OFFICIAL COMMENT

Sections 203 through 206 track the traditional RURESA action involving residents of separate States. In this situation the initiating State does not assert personal jurisdiction over the nonresident, but instead forwards the case to another, responding State, which has the authority to assert personal jurisdiction over its resident. This section identifies the various roles a tribunal of the forum may serve; as appropriate, it may act as either an initiating or a responding tribunal. Under UIFSA a tribunal may serve as a responding tribunal even when there is no initiating tribunal in another State. This accommodates the direct filing of an action in a responding tribunal by a nonresident.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted "state" for "this State" in the catchline.

§ 52C-2-204. Simultaneous proceedings in another state.

OFFICIAL COMMENT

This section is similar to Section 6 of the Uniform Child Custody Jurisdiction Act. Under the one-order system established by UIFSA, it is necessary to provide a new procedure to eliminate the multiple orders so common under RURESA and URESA. This requires cooperation between, and deference by, sister-state tribunals in order to avoid issuance of competing support orders. To this end, tribunals are expected to take an active role in seeking out information about support proceedings in other States concerning the same child. Depending on the circumstances, one or the other of two tribunals considering the same support obligation should decide to defer to the other. In this regard, UIFSA makes a significant departure from the approach adopted by the UCCJA, which chooses "first filing" as the method for resolving competing jurisdictional disputes. In the analogous situation, the federal Parental Kidnapping Prevention Act chooses the home State of the child to establish priority. Given the preemptive nature of the PKPA, and the possibility that custody and support are both involved in the case, UIFSA opts for the federal method of resolving disputes between competing jurisdictional assertions by establishing a priority for the tribunal in the child's home State. If the child has no home State, "first filing" controls.

§ 52C-2-205. (Effective until June 30, 1998) Continuing, exclusive jurisdiction.

(a) A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a child support order:

(1) As long as this State remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) Until all of the parties who are individuals have filed written consents with the tribunal of this State for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

(b) A tribunal of this State issuing a child support order consistent with the law of this State may not exercise its continuing jurisdiction to modify the order if the order has been modified by a tribunal of another state pursuant to a law substantially similar to this Chapter.

(c) If a child support order of this State is modified by a tribunal of another state pursuant to a law substantially similar to this Chapter, a tribunal of this State loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued in this State, and may only:

(1) Enforce the order that was modified as to amounts accruing before the modification;

(2) Enforce nonmodifiable aspects of that order; and

(3) Provide other appropriate relief for violations of that order which occurred before the effective date of the modification.

(d) A tribunal of this State shall recognize the continuing, exclusive jurisdiction of a tribunal of another state which has issued a child support order pursuant to a law substantially similar to this Chapter.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(f) A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this State may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state. (1995, c. 538, s. 7(c); 1997-433, s. 10.2.)

OFFICIAL COMMENT

This section is perhaps the most crucial provision in UIFSA. Drawing on the precedent of the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, the issuing tribunal retains continuing, exclusive jurisdiction over a child support order, except in very narrowly defined circumstances. As long as one of the individual parties or the child continues to reside in the issuing State, and as long as the parties do not agree to the contrary, the issuing tribunal has continuing, exclusive jurisdiction over its order — which in practical terms means that it may modify its order. The statute attempts to be even-handed — the identity of the remaining party — obligor or obligee — does not matter. If the individual parties have left the issuing State but the child remains behind, continuing, exclusive jurisdiction remains with the issuing State.

The other side of the coin follows logically. Just as subsection (a)(1) defines the retention of continuing, exclusive jurisdiction, by clear implication the subsection also defines how jurisdiction to modify may be lost. That is, if all the relevant persons — the obligor, the individual obligee, and the child — have permanently left the issuing State, the issuing State no longer has an appropriate nexus with the parties or child to justify exercise of jurisdiction to modify. Further, the issuing tribunal has no current information about the factual circumstances of anyone involved, and the taxpayers of that State have no reason to expend public funds on the process. Note, however, that the original order of the issuing tribunal remains valid and enforceable. That order is in effect not only in the issuing State and those States in which the order has been registered, but also may be registered and enforced in additional States even after the issuing State has lost its power to modify its order, see Sections 601-604 (Registration and Enforcement of Support Order), *infra*. The original order remains in effect until it is properly modified in accordance with the narrow terms of Sections 609-612 (Registration and Modification of Child Support Order), *infra*.

According to the logical implication of subsection (a)(2), the issuing State may also lose its continuing, exclusive jurisdiction to modify if the parties consent in writing for another State to assume jurisdiction to modify (even though one of the parties or the child continues to reside in the issuing State). The only statutory requirement for the parties to divest the issuing tribunal of its continuing, exclusive jurisdiction is the filing of a written agreement to that effect with that tribunal. The Drafting Committee anticipated that such an agreement would seldom occur because of the almost universal desire of each party to prefer his or her local tribunal; but, the Committee also believed that the parties should be allowed to agree upon an alternate forum if they choose to do so.

Although subsection (a) identifies the methods for the retention and the loss of continuing, exclusive jurisdiction by the issuing tribunal, it does not confer jurisdiction to modify on another tribunal. Modification requires that a tribunal have personal jurisdiction over the parties and meet other criteria as provided in Sections 609 through 614, *infra*. It should also be noted that nothing in this section is intended to deprive a tribunal which has lost continuing, exclusive jurisdiction of the power to enforce arrearages that have accrued during the existence of a valid order.

Spousal support is treated differently; the issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation. Sections 205(f) and 206(c) state that the procedures of UIFSA are not available to a responding tribunal to modify the existing spousal support order of the issuing State. This marks a radical departure from RURESA, which treated spousal and child support orders identically. Under UIFSA, modification of spousal support is limited to a procedure whereby an action is initiated outside of the issuing State and a tribunal in that original State modifies its order under its law. While UIFSA revises RURESA in this regard, in fact this will have a minimal effect on actual practice. Interstate modification of pure spousal support was relatively rare under RURESA, and played almost no part in the activities of support enforcement agencies.

The prohibition of modification of spousal support by a nonissuing State tribunal under UIFSA is consistent with the principle that a tribunal should apply local law to such cases to insure efficient handling and to minimize choice of law problems. Avoiding conflict of law problems is almost impossible if spousal support orders are subject to modification in a second State. For example, States take widely varying views of the effect on a spousal support order of the obligee's remarriage or nonmarital cohabitation. Making a distinction between spousal and child support is further justified because the standards for modification of child support and spousal support are very different. In most jurisdictions a dramatic improvement in the obligor's economic circumstances will have little or no relevance in an action seeking an upward modification of spousal support, while a similar change in an obligor's situation typically is the primary basis for an increase in child support. This disparity is founded on a policy choice that post-divorce success of an obligor-parent should benefit the obligor's child, but not the obligor's ex-spouse.

Finally, UIFSA does not provide for shifting the continuing, exclusive jurisdiction over a spousal-support order by mutual agreement. That procedure is limited to child support under subsection (a)(2). Note that the Act is silent rather than preclusive on the subject. If the parties wish to enter into such an agreement, it is up to the individual States to decide whether to recognize it. A waiver of continuing, exclusive jurisdiction and subsequent modification of spousal support by a tribunal of another State simply is not authorized under the auspices of UIFSA.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, in subdivision (a)(2) substituted "all of the parties who are individuals have filed written consents" for "each individual party has filed written consent."

§ 52C-2-206. Enforcement and modification of support order by tribunal having continuing jurisdiction.

OFFICIAL COMMENT

This section is the correlative of the continuing, exclusive jurisdiction asserted in the preceding section. Subsection (a) authorizes a tribunal of the enacting State to initiate a request for enforcement or modification to the tribunal with continuing, exclusive jurisdiction over a support order.

Subsection (b) confirms the power of the issuing tribunal to modify its child support order as the responding tribunal, provided it retains a sufficient nexus with its order. UIFSA defines that nexus as a situation in which the child or at least one of the parties continues to reside in the issuing State. Subsection (b) also makes a vital contribution to the exercise of its continuing, exclusive jurisdiction if one of the parties leaves the State after the initial order was issued. The petitioner and the absent respondent may take advantage of the special rules of evidence and discovery in order to provide the tribunal with maximum current information in a modification proceeding.

Subsection (c) is the correlative of Section 205(f), acknowledging the continuing, exclusive jurisdiction of the tribunal ordering alimony and specifically prohibiting a responding tribunal from modifying a spousal support order of another State.

Part 3. (Effective until June 30, 1998) Reconciliation of Multiple Orders.

Part 3. (Effective June 30, 1998) Reconciliation With Orders of Other States.

§ 52C-2-207. (Effective until June 30, 1998) Recognition of controlling child support order.

(a) If a proceeding is brought under this Chapter and only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this Chapter, and two or more child support orders have been issued by tribunals of this State or another state with regard to the same obligor and child, a tribunal of this State shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:

§ 52C-2-207 has a delayed effective date. See notes.

(1) If only one of the tribunals would have continuing, exclusive jurisdiction under this Chapter, the order of that tribunal controls and must be so recognized.

(2) If more than one of the tribunals would have continuing, exclusive jurisdiction under this Chapter, an order issued by a tribunal in the current home state of the child controls and must be so recognized, but if an order has not been issued in the current home state of the child, the order most recently issued controls and must be so recognized.

(3) If none of the tribunals would have continuing, exclusive jurisdiction under this Chapter, the tribunal of this State having jurisdiction over the parties shall issue a child support order, which controls and must be so recognized.

(c) If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in this State, a party may request a tribunal of this State to determine which order controls and must be so recognized under subsection (b) of this section. The request must be accompanied by a certified copy of every support order in effect. The requesting party shall give notice of the request to each party whose rights may be affected by a certified copy of every support order in the effect. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(d) The tribunal that issued the controlling order under subsection (a), (b), or (c) of this section is the tribunal that has continuing, exclusive jurisdiction under G.S. 52C-2-205.

(e) A tribunal of this State which determines by order the identity of the controlling order under subdivision (b)(1) or (2) of this section or which issues a new controlling order under subdivision (b)(3) of this section shall state in that order the basis upon which the tribunal made its determination.

(f) Within 30 days after issuance of an order determining the identity of the controlling order, the party obtaining the order shall file a certified copy of it with each tribunal that issued or registered an earlier order of child support. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order. (1995, c. 538, s. 7(c); 1997-433, s. 10.3(b).)

OFFICIAL COMMENT

Sections 207-209 are designed to span the gulf between the one-order system created by UIFSA and the multiple-order system previously in place under RURESA and URESA. A keystone of UIFSA is to provide a transitional procedure for the eventual elimination of existing multiple support orders in an expeditious and efficient manner. But, even assuming all U.S. jurisdictions enact UIFSA, many years will pass before its one-order system will be completely in place. Multiple orders covering the same parties and child number in the tens of thousands; it can be reasonably anticipated that these orders will continue in effect far into the future. To begin the process towards a one-order system, however, this section provides a relatively simple procedure designed to identify a single viable order that will be entitled to prospective enforcement in every UIFSA State.

Subsection (a) declares that if only one child support order exists, it is to be denominated the controlling order, irrespective of when and where it was issued and whether any of the individual parties or the child continue to reside in the issuing State.

Subsection (b) establishes the priority scheme for recognition and prospective enforcement of a single order among existing multiple orders regarding the same obligor, obligee, and child. For UIFSA to function, one order must be denominated as the controlling order, and its issuing tribunal must be recognized as having continuing, exclusive jurisdiction. In choosing among existing multiple orders, none of which can be distinguished as being in conflict with the principles of UIFSA, subsection (b)(1) gives first priority to the order issued by the only tribunal that is entitled to continuing, exclusive jurisdiction under the terms of UIFSA, *i.e.*, an individual party or the child continues to reside in that State, and no other issuing State meets this criterion. If two or more tribunals would have continuing, exclusive jurisdiction under the Act, subsection (b)(2) first looks to the tribunal of the child's current home State. If that State has not issued a support order, subsection (b)(2) looks next to the order most recently issued. Finally, if none of the existing multiple orders are entitled to be denominated as the controlling order because none of the preceding priorities apply, the forum tribunal is directed to issue a new order, assuming that it has personal jurisdiction over the obligor and obligee. The new order is to be treated as the controlling order, establishing the support obligation, the nonmodifiable aspects of the support obligation, see Section 611(c), *infra*, and the issuing tribunal's continuing, exclusive jurisdiction. The rationale for creating yet another order is that there is no valid reason under UIFSA to prefer the terms of one of the multiple orders over another.

As originally promulgated, UIFSA did not come to grips with whether existing multiple orders issued by different States might be entitled to full faith and credit without regard to the determination of the controlling order under the Act. The drafters took the position that state law, however uniform, could not interfere with the ultimate interpretation of a constitutional directive. Fortunately, this question has almost certainly been mooted by the 1996 amendment to 28 U.S.C. § 1738B, Full Faith and Credit for Child Support Orders. Congress adopted the terms of Section 207 of UIFSA virtually word for word in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Pub. L. 104-193, Aug. 22, 1996, 110 Stat. 2221.

It is not altogether clear whether the terms of UIFSA apply to a strictly intrastate case; that is, a situation in which multiple child support orders have been issued by multiple tribunals of a single State and all parties and the child continue to reside in that State. This is not an uncommon situation, often traceable to the intrastate applicability of RURESA. A literal reading of the statutory language suggests the section applies. For a tribunal of the issuing State to so conclude will further the goal of the Act of identifying a single controlling order for prospective enforcement and modification. At the very least, the section provides a template for resolving such conflicts, most likely yielding a determination that the last order is the controlling order.

Subsection (c), added in 1996, clarifies that any party may request a tribunal of the forum State to identify the controlling order. That party is directed to fully inform the tribunal of all existing child support orders.

Amended subsection (d) provides that the determination of the controlling order under this section has the effect of establishing the tribunal with continuing, exclusive jurisdiction; only the order of that tribunal is entitled to prospective enforcement by a sister State. To help insure regularity, subsection (e) directs the forum tribunal to set forth the basis of its finding. Finally, the party obtaining the determination is directed by subsection (f) to notify all interested tribunals of the decision.

Section 207 presumes that a tribunal will be fully informed about all existing orders if it is requested to determine which one of the existing multiple child support orders is to be accorded prospective enforcement. If this does not occur and one or more existing orders is not considered by the tribunal, the finality of its decision is likely to turn on principles of estoppel on a case-by-case basis. Assuming that the parties were accorded notice and opportunity to be heard by the tribunal, a final decision on the subject is entitled to full faith and credit.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted "of Multiple Orders" for "With Orders of Other States" in the heading of Part 3; and rewrote this section.

§ 52C-2-208. Multiple child support orders for two or more obligees.

OFFICIAL COMMENT

Multiple orders may involve two or more families of the same obligor. Although all such orders are entitled to enforcement, practical difficulties are often presented. For example, full enforcement of each of the multiple orders may exceed the maximum allowed for income withholding. The federal statute, 42 U.S.C. § 666(b)(1), requires that to be eligible for the federal funding for enforcement, States must provide for a maximum to be withheld from earnings for child support in a percentage that may not exceed the federal consumer credit code limitations on wage garnishment, 15 U.S.C. § 1673(b). In order to allocate resources between competing families, UIFSA refers to state law. The basic principle is that one or more foreign orders for the support of an out-of-state family of the obligor, and one or more orders of an in-state family, are all of equal dignity. In allocating payments to different obligees, every child support order should be treated as if it had been issued by a tribunal of the forum State.

§ 52C-2-209. Credit for payments.

OFFICIAL COMMENT

This section is derived from RURESA § 31 (Application of Payments). Because of the multiple orders possible under RURESA, that section was primarily concerned with insuring that payments made on a particular order were credited towards the amounts due on all other orders. For example, full payment of $300 on an order of State C earns a 100% pro tanto discharge of the current support owed on a $200 order of State A, and a 75% credit against a $400 order of State B. Crediting payments against arrears on multiple orders is more complex, and is subject to different constructions in various States. Under the one-order system of UIFSA, an obligor ultimately will be ordered to pay only one sum-certain amount for current support (a sum certain to reduce arrears, if any).

The issuing tribunal is ultimately responsible for the overall control of the enforcement methods employed and for accounting for the payments made on its order from multiple sources. Until that scheme is fully in place, however, it will be necessary to continue to mandate pro tanto credit for actual payments made against all existing orders.

ARTICLE 3.

Civil Provisions of General Application.

§ 52C-3-301. Proceedings under this Chapter.

OFFICIAL COMMENT

This section is a "road map" of the types of actions authorized by UIFSA. Although such a section is unusual for a Uniform Act, it is justified in this instance because the majority of those persons administering the Act are not attorneys and will doubtless find such assistance to be useful.

Subsection (a) mandates application of the general provisions of this article to all UIFSA actions.

Subsection (b) identifies the general principles and structure of the Act. Note that although orders for spousal support and child support are generally dealt with in the same manner, subsection (b)(5) implicitly restates the fact that the modification provisions are limited to child support orders, and do not apply to spousal support orders.

Subsection (c) establishes the basic two-state procedure contemplated by the Act. The initiating responding procedure is derived from the two-state procedure under RURESA. Direct filing in the responding State by an individual or a support enforcement agency without reference to an initiating State is new to this Act, however.

§ 52C-3-302. Action by minor parent.

OFFICIAL COMMENT

This section is derived from RURESA § 13. A minor parent may maintain an action under UIFSA without the appointment of a guardian ad litem, even if the law of the forum jurisdiction requires a guardian for an in-state case. If a guardian or legal representative has been appointed, he or she may act on behalf of the minor's child in seeking support.

§ 52C-3-303. Application of law of this State.

OFFICIAL COMMENT

Historically States have insisted that forum law be applied to support cases whenever possible. This continues as a key principle of UIFSA. In general, a responding tribunal has the same powers in an action involving interstate parties as it has in an intrastate case. This inevitably means that the Act is not self-contained; rather, it is supplemented by the forum's statutes and procedures governing support orders. To insure the efficient processing of the huge number of interstate support cases, it is vital that decision-makers apply familiar rules of local law to the maximum degree possible. This must be accomplished in a manner consistent with the overriding principle of UIFSA that enforcement is of the issuing tribunal's order, and that the responding State does not make the order its own as a condition of enforcing it.

§ 52C-3-304. (Effective until June 30, 1998) Duties of initiating tribunal.

(a) Upon the filing of a petition authorized by this Chapter, an initiating tribunal of this State shall forward three copies of the petition and its accompanying documents:

(1) To the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) If the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) If a responding state has not enacted this act or a law or procedure substantially similar to this act, a tribunal of this State may issue a certificate or other document and make findings required by the law of the responding state. If the responding State is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state. (1995, c. 538, s. 7(c); 1997-433, s. 10.4.)

OFFICIAL COMMENT

Under RURESA § 14, the initiating tribunal was required to make a preliminary finding of the existence of a support obligation. As a practical matter, observance of this obligation was at best erratic across the nation; very often courts viewed the finding as boilerplate. By contrast, under UIFSA the role of the initiating tribunal clearly consists of the ministerial function of forwarding the documents. *See Mossburg v. Coffman*, 6 Kan. App. 2d 428, 629 P.2d 745 (1981); *Neff v. Johnson*, 391 S.W.2d 760 (Tex. Civ. App. — Houston 1965, no writ).

New subsection (b), a transition provision, facilitates interstate enforcement between UIFSA States and those URESA and RURESA States prior to the likely nationwide enactment of UIFSA by January 1, 1998. *See* P.L. 104-193, § 321. Although the three uniform acts seek the same goal — interstate child support — and are compatible in the main, neither URESA nor RURESA can be said to be "substantially similar" to UIFSA. Careful reading of UIFSA reveals that an arms-length view is maintained on this topic, see Section 101(7), (16), and (19)(ii), *supra*. Exemplary of the imperfect fit between the acts is the number of complaints received during the period between the original promulgation of the Act in February 1993 and the amendments in July 1996 alleging that the elimination of the RURESA requirement for certification of a duty of support had led to serious communication problems between RURESA States and UIFSA States. Supposedly the difference in procedure and documentation required by the two acts caused a tribunal in one State or the other to refuse to enforce a child support obligation unless the paperwork conformed to its requirements or, alternatively, a tribunal refused to provide the requested documents on the basis that the law of its State did not require the production of such documents. The loser in the exercise of such hypertechnical interstate recalcitrance was the child who was due support. In response to such bureaucratic impasses, the 1996 amendment authorizes a tribunal in a UIFSA State to provide whatever documentation is required by a RURESA State to facilitate child support enforcement.

Supplying documentation required by a foreign jurisdiction that is not required by UIFSA procedure will continue to be necessary into the future. The initiating tribunal is authorized to cooperate and provide whatever information or documentation is requested by the foreign jurisdiction, *i.e.*, a statement of the amount of support being requested is required by Canadian provinces.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, added the subsection (a) designation, and added subsection (b).

§ 52C-3-305. (Effective until June 30, 1998) Duties and powers of responding tribunal.

(a) When a responding tribunal of this State receives a petition or comparable pleading from an initiating tribunal or directly pursuant to G.S. 52C-3-301(c) it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

(b) A responding tribunal of this State, to the extent otherwise authorized by law, may do one or more of the following:

(1) Issue or enforce a support order, modify a child support order, or render a judgment to determine parentage;

(2) Order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(3) Order income withholding;

§ 52C-3-305 has a delayed effective date. See notes.

(4) Determine the amount of any arrears, and specify a method of payment;

(5) Enforce orders by civil or criminal contempt, or both;

(6) Set aside property for satisfaction of the support order;

(7) Place liens and order execution on the obligor's property;

(8) Order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment, and telephone number at the place of employment;

(9) Issue an order for arrest for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the order for arrest in any local and State computer systems for criminal warrants;

(10) Order the obligor to seek appropriate employment by specified methods;

(11) Award reasonable attorneys' fees and other fees and costs; and

(12) Grant any other available remedy.

(c) A responding tribunal of this State shall include in a support order issued under this Chapter, or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of this State may not condition the payment of a support order issued under this Chapter upon compliance by a party with provisions for visitation.

(e) If a responding tribunal of this State issues an order under this Chapter, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any. (1995, c. 538, s. 7(c); 1997-433, s. 10.5.)

OFFICIAL COMMENT

This section revises RURESA §§ 9, 18, 19, 24, 25, and 26. It contains both ministerial functions, such as those in subsection (a); judicial functions, as in subsection (b); and substantive rules applicable to interstate cases, subsections (c)-(e). Because a responding tribunal may be an administrative agency rather than a court, the Act explicitly states that a tribunal is not granted powers that it does not otherwise possess under state law. For example, authority to enforce orders by contempt often is limited to courts.

Subsection (a) eliminates the authorization of notice "by first class mail." Several reasons underlie this deletion. Originally the authorization of first class mail was intended to facilitate relatively informal notice of the issuing tribunal's action, that is, formal service of the order by an officer was not to be required. The intent was that first class mail notice would be sufficient. The deletion of specificity regarding notice is not intended to increase the burden of giving notice. Rather, the advent of a variety of swifter and perhaps even more reliable forms of notice in the modern era justifies the deletion of the first class mail requirement, which may very well be unduly restrictive. For example, many States now authorize notice by telephone facsimile (FAX), or by an express delivery company. In addition, the authorization of legal notice of at least some documents by electronic mail (email) may not be far off. Finally, authorization of notice by first class mail in UIFSA could be regarded as an undue interference with state law, something a Uniform Act should avoid.

Subsection (b)(7) purposefully avoids mention of the priority of liens issued under UIFSA. As is generally true under the Act, that priority will be determined by applicable state law concerning support liens. Subsection (b) supplies much more detail than did RURESA §§ 24 and 26 to make explicit the wide range of specific powers of the responding tribunal. Subsection (b)(9) replaces RURESA

§ 16 (Jurisdiction By Arrest), which authorized the responding tribunal "to obtain the body of the obligor" if the tribunal "believes that the obligor may flee ...." Under UIFSA, the physical seizure of an obligor is left to the procedures available under state law in other civil cases.

Subsection (c) clarifies that the details of calculating the child support order are to be included along with the order. Local law generally requires that variation from the child support guidelines must be explained, see 42 U.S.C. § 667; this requirement is extended to interstate cases.

Subsection (d) states that an interstate support order may not be conditioned on compliance with a visitation order. While this may be at variance with state law governing intrastate cases, under a UIFSA action the petitioner generally is not present before the tribunal. This distinction justifies prohibiting visitation issues from being litigated in the context of a support proceeding.

Subsection (e) introduces the policy determination that the petitioner, the respondent, and the initiating tribunal, if any, shall be kept informed about actions taken by the responding tribunal.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, deleted "by first class mail" following "petitioner" in subsection (a) and following "copy of the order" in subsection (e).

§ 52C-3-306. (Effective until June 30, 1998) Inappropriate tribunal.

If a petition or comparable pleading is received by an inappropriate tribunal of this State, it shall forward the pleading and accompanying documents to an appropriate tribunal in this State or another state and notify the petitioner where and when the pleading was sent. (1995, c. 538, s. 7(c); 1997-433, s. 10.6.)

OFFICIAL COMMENT

This section directs a tribunal receiving UIFSA documents in error to forward the original documents to their proper destination without undue delay, whether the appropriate tribunal is located in the same State or elsewhere. This section is intended to apply both to initiating and responding tribunals receiving such documents. For example, if a tribunal is inappropriately designated as the responding tribunal, it shall forward the petition to the appropriate responding tribunal wherever located, if known, and notify the initiating tribunal of its action. Such a procedure is much to be preferred to returning the documents to the initiating tribunal to begin the process anew. Cooperation of this sort will facilitate the ultimate goals of the Act.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, deleted "by first class mail" following "petitioner."

§ 52C-3-307. (Effective Until June 30, 1998) Duties of support enforcement agency.

(a) A support enforcement agency of this State, upon request, shall provide services to a petitioner in a proceeding under this Chapter.

(b) A support enforcement agency that is providing services to the petitioner as appropriate shall:

(1) Take all steps necessary to enable an appropriate tribunal in this State or another state to obtain jurisdiction over the respondent;

(2) Request an appropriate tribunal to set a date, time, and place for a hearing;

(3) Make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) Within two days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written notice from an initiating, responding, or registering tribunal, send a copy of the notice to the petitioner;

(5) Within two days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written communication from the respondent or the respondent's attorney, send a copy of the communication to the petitioner; and

(6) Notify the petitioner if jurisdiction over the respondent cannot be obtained.

(c) This Chapter does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency. (1995, c. 538, s. 7(c); 1997-433, s. 10.7.)

OFFICIAL COMMENT

This section is derived from RURESA §§ 12, 18, and 19.

Subsection (a) changes the focus of RURESA § 12 (Officials to Represent Obligee) from representation of an obligee to providing services to a petitioner. Care should be exercised in the use of terminology given this substantial alteration of past practice under RURESA. Not only may either the obligee or the obligor request services, but that request may be in the context of the establishment of an initial support order, enforcement or review and adjustment of an existing order, or a modification of that order (upwards or downwards). Note that the Act does not distinguish between child support and spousal support for purposes of providing services. Note also, that the services available may differ significantly; for example, modification of spousal support is limited to the issuing State, see Section 205(f), *supra*.

Subsection (b) responds to the complaint of many RURESA petitioners that they were not properly kept informed about the progress of their requests for services.

Subsection (c) explicitly states that UIFSA neither creates nor rejects the establishment of an attorney-client or fiduciary relationship between the support enforcement agency and a petitioner receiving services from that agency. This highly controversial issue is left to otherwise applicable state law.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, deleted "by first class mail" following "notice" in subdivision (b)(4) and following "communication" in subdivision (b)(6).

§ 52C-3-308. Representation of obligee.

OFFICIAL COMMENT

This section continues the principle of RURESA § 18(c), under which the State Attorney General, or an alternative designated by state law, is given oversight responsibility for the diligent provision of services by the support enforcement agency and the power to seek compliance with the Act.

§ 52C-3-309. Duties of State information agency.

(a) The Department of Health and Human Services, Division of Social Services, is designated as the State information agency under this Chapter.

(b) The State information agency shall:

(1) Compile and maintain a current list, including addresses, of the tribunals in this State which have jurisdiction under this Chapter and any support enforcement agencies in this State and transmit a copy to the state information agency of every other state;

(2) Maintain a register of tribunals and support enforcement agencies received from other states;

(3) Forward to the appropriate tribunal in the place in this State in which the individual obligee or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding under this Chapter received from an initiating tribunal or the state information agency of the initiating state; and

(4) Obtain information concerning the location of the obligor and the obligor's property within this State not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, drivers licenses, and social security. (1995, c. 538, s. 7(c); 1997-443, s. 11A.118(a).)

OFFICIAL COMMENT

This section, based on RURESA § 17 (State Information Agency), continues the information-gathering duties of the central information agency.

Subsection (b)(4) does not provide independent access to the information sources or to the governmental documents listed. Because States have different requirements and limitations concerning such access based on differing views of the privacy interests of individual citizens, the agency is directed to use all lawful means under the relevant state law to obtain and disseminate information.

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 52C-3-310. Pleadings and accompanying documents.

OFFICIAL COMMENT

Derived from RURESA § 11, this section establishes the basic requirements for drafting and filing interstate pleadings. Subsection (a) should be read in conjunction with Section 312, which provides for the confidentiality of certain information if disclosure is likely to result in harm to a party or a child.

Subsection (b) provides authorization for the use of the federally authorized forms promulgated in connection with the IV-D child support enforcement program and mandates substantial compliance with those forms. Although the use of other forms is not prohibited, statutory preapproval of forms that substantially conform to those sanctioned by federal law will help to standardize documents, with a concomitant improvement in the efficient processing of UIFSA actions.

§ 52C-3-311. Nondisclosure of information in exceptional circumstances.

OFFICIAL COMMENT

Public awareness of and sensitivity to the dangers of domestic violence has significantly increased since the original promulgation of URESA and RURESA. This section authorizes confidentiality in instances where there is a serious risk of domestic violence or child abduction. Although local law generally governs the conduct of the forum tribunal, state law may not provide for maintaining secrecy about the exact whereabouts of a litigant or other information ordinarily required to be disclosed under state law, *i.e.*, Social Security number of the parties or the child. If so, this provision creates a confidentiality provision which is particularly appropriate in the light of the intractable problems associated with interstate (as opposed to intrastate) childnapping.

§ 52C-3-312. Costs and fees.

OFFICIAL COMMENT

This section is derived from RURESA § 15 (Costs and Fees), which authorized fees and costs to be assessed against "the obligor." In recognition of the fact that under UIFSA either the obligor or the obligee may file suit or seek services from a support enforcement agency, subsection (a) permits either party to file without payment of a filing fee or other costs. Subsection (b), however, continues the RURESA determination that only the support obligor may be assessed the specified costs and fees.

Subsection (c) provides a sanction to deal with a frivolous contest regarding compliance with an interstate withholding order, registration of a support order, or comparable delaying tactics regarding an appropriate enforcement remedy.

§ 52C-3-313. Limited immunity of petitioner.

OFFICIAL COMMENT

This section significantly expands RURESA § 32. Under subsection (a), direct or indirect participation in a UIFSA proceeding does not subject a petitioner to an assertion of personal jurisdiction over the petitioner by the forum State in other litigation between the parties. The primary object of this prohibition is to preclude joining disputes over child custody and visitation with the establishment, enforcement, or modification of child support. This prohibition strengthens the ban on visitation litigation established in Section 305(d). A petition for affirmative relief under UIFSA limits the jurisdiction of the tribunal to the boundaries of the support proceeding.

Similarly, subsection (b) grants a litigant a variety of limited immunity from service of process during the time a party is physically present in a State for a UIFSA action. The immunity provided is in no way comparable to diplomatic immunity, however, which should be clear from reading subsection (c) in conjunction with the other subsections.

Subsection (c) does not extend immunity to civil litigation unrelated to the support action which stems from contemporaneous acts committed by a party while present in the State for the support litigation. For example, a petitioner involved in an automobile accident or a contract dispute over the cost of lodging while present in the State does not have immunity from a civil suit on those issues.

§ 52C-3-314. Nonparentage as defense.

OFFICIAL COMMENT

Arguably this section does no more than restate the basic principle of res judicata. However, there is a great variety of state law regarding presumptions of parentage and available defenses after a prior determination of parentage. This section is intended neither to discourage nor encourage collateral attacks in situations in which the law of a foreign jurisdiction is at significant odds with local law. If a collateral attack on a parentage decree is permissible under the law of the issuing jurisdiction, such an action must be pursued in that forum and not in a UIFSA proceeding. In sum, this section mandates that a parentage decree rendered by another tribunal is not subject to collateral attack in a UIFSA proceeding. Of course, an attack on an alleged final order on a fundamental constitutional ground is permissible in the forum State, such as a denial of due process because of a failure of notice and opportunity to be heard or a lack of personal jurisdiction over a party who did not answer or appear.

Similarly, the law of the issuing State may provide for a determination of parentage based on certain specific acts of the obligor acknowledging parentage as a substitute for a decree, *i.e.*, signing the child's birth certificate or publicly acknowledging a duty of support after receiving the child into his home. UIFSA also is neutral regarding a collateral attack on such a parentage determination. The responding tribunal must give effect to such an act of acknowledgment of parentage if it is recognized as determinative in the issuing State. The consistent theme of this section is that a collateral attack cannot be made in a UIFSA proceeding.

§ 52C-3-315. Special rules of evidence and procedure.

OFFICIAL COMMENT

This section combines RURESA §§ 9, 19, 21, 22, and 23; and, provides additional innovative methods for gathering evidence in interstate cases.

Subsections (b) through (f) greatly expand on RURESA § 23 (Rules of Evidence). The intent is to eliminate as many potential hearsay problems as possible in interstate litigation because the out-of-state party and that party's witnesses usually do not appear in person at the hearing.

Subsection (d) provides a simplified means for proving health care expenses related to the birth of a child. Because ordinarily these charges are not in dispute, this is designed to obviate the cost of having health care providers appear in person or of obtaining affidavits of business records from each provider.

Subsections (e) and (f) encourage tribunals and litigants to take advantage of modern methods of communication in interstate support litigation; most dramatically, the out-of-state party is authorized to testify by telephone and supply documents by fax.

Subsection (g) codifies the rule in effect in many States that in civil litigation an adverse inference may be drawn from a litigant's silence. *See, i.e., In re Matter of Joseph P.*, 487 N.Y.S.2d 685 (Fam. Ct. 1985); Pa. Cons. Stats. Ann., Tit. 23, § 5104(c) (1991) and La. Rev. Stats., Tit. 9, § 396(A) (1992) ("if any party refuses to submit to such tests, the court may resolve the question of paternity against such party"); 9 N.J. Stats. Ann. 17-51(d) (1991) ("refusal to submit to blood tests or genetic tests, or both, may be admitted into evidence and shall give rise to the presumption that the results of the tests would have been unfavorable to the interests of the party refusing").

§ 52C-3-316. Communications between tribunals.

OFFICIAL COMMENT

This section is derived from UCCJA § 7(d) (Inconvenient Forum), which authorizes communications between courts in order to facilitate decisions under that Act. In contrast to RURESA, broad cooperation between tribunals is permitted under UIFSA to expedite establishment and enforcement of a support order.

§ 52C-3-317. Assistance with discovery.

OFFICIAL COMMENT

This section takes another logical step to facilitate interstate cooperation by enlisting the power of the forum to assist a tribunal of another State with the discovery process. The grant of authority is quite broad, enabling the tribunal of the enacting State to fashion its remedies to facilitate discovery consistent with local practice.

§ 52C-3-318. Receipt and disbursement of payments.

OFFICIAL COMMENT

The first sentence of this section is derived from RURESA § 29 (Additional Duty of Initiating Court). The second sentence confirms the duty of the agency or tribunal to furnish payment information in interstate cases.

ARTICLE 4.

Establishment of Support Order.

§ 52C-4-401. Petition to establish support order.

OFFICIAL COMMENT

This section authorizes a tribunal of the responding State to issue temporary and permanent support orders binding on an obligor over whom the tribunal has personal jurisdiction. UIFSA does not permit such orders to be issued when another support order exists, thereby prohibiting a second tribunal from establishing another support order and the accompanying continuing, exclusive jurisdiction over the matter. *See* Section 205 (Continuing, Exclusive Jurisdiction) and Section 206 (Enforcement and Modification of Support Order by Tribunal Having Continuing Jurisdiction).

ARTICLE 5.

(Effective until June 30, 1998) Enforcement of Order of Another State Without Registration.

ARTICLE 5.

(Effective June 30, 1998) Direct Enforcement of Order of Another State Without Registration.

§ 52C-5-501. (Effective until June 30, 1998) Employer's receipt of income-withholding order of another state.

(a) An income-withholding order issued in another state may be sent to the person or entity defined or identified as the obligor's employer under the income-withholding provisions of Chapter 50 or Chapter 110 of the General Statutes, as applicable, without first filing a petition or comparable pleading or registering the order with a tribunal of this State. Upon receipt of the order, the employer shall:

(1) Treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this State;
(2) Immediately provide a copy of the order to the obligor; and
(3) Distribute the funds as directed in the withholding order.

(b) Repealed by Session Laws 1997-433, s. 10.8, effective October 1, 1997, and expiring June 30, 1998. (1995, c. 538, s. 7(c); 1997-433, s. 10.8.)

OFFICIAL COMMENT

In 1984 Congress mandated that all States adopt procedures for enforcing income-withholding orders of sister States. As a result, the Child Support Project of the American Bar Association and the National Conference of State Legislatures promulgated a Model Interstate Income Withholding Act in 1985; however, the Model Act was not widely enacted. RURESA was silent on the subject. Direct recognition by the out-of-state obligor's employer of a withholding order issued by another State long was sought by support enforcement associations and other advocacy groups. In 1993 UIFSA recognized such a procedure.

Section 501 is deliberately written in the passive voice; the Act does not restrict who may send an income-withholding order across state lines. Although the sender will ordinarily be a child support enforcement agency or the obligee, the obligor or any other person may supply an employer with the income-withholding order. Further, "sending a copy" of a withholding order to an employer is clearly distinguishable from "service" of that order on the same employer. The latter necessarily intends to invoke the tribunal's authority only over an employer doing business in the forum State. But, for there to be valid "service" of a withholding order on an employer in another State, the tribunal must have authority to bind the employer. In most cases, this requires the assertion of the authority of a local responding tribunal in a "registration for enforcement" proceeding. The formality of "service" defeats the whole purpose of direct income withholding across state lines. This explains the deletion of the original requirement in the 1993 version of UIFSA that the income-withholding order of one State "may be sent by first class mail." In sum, the process contemplated is direct "notification" to an employer in another State of a withholding order without the involvement of initiating or responding tribunals. Therefore, receipt of a copy of a withholding order by facsimile, regular first class mail, registered or certified mail, or any other type of direct notice is sufficient to provide the requisite notice to trigger direct income withholding in the absence of a contest by the employee-obligor.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, deleted "Direct" preceding "Enforcement" in the Article heading; substituted "Employer's receipt" for "Recognition" in the catchline; deleted the subsection (a) designation; in former subsection (a) deleted "by first class mail" following "may be sent"; and deleted subsection (b), concerning contesting the validity or enforcement of an income withholding order issued in another state.

§ 52C-5-502. (Effective until June 30, 1998) Employer's compliance with income-withholding order of another state.

(a) Upon receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this State.

(c) Except as otherwise provided in subsection (d) of this section and G.S. 52C-5-503, the employer shall withhold and distribute the funds as directed in the income-withholding order by complying with terms of the order which specify:

(1) The duration and amount of periodic payments of current child support, stated as a sum certain;

(2) The person or agency designated to receive payments and the address to which the payments are to be forwarded;

(3) Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(5) The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) The employer's fee for processing an income-withholding order;

(2) The maximum amount permitted to be withheld from the obligor's income; and

(3) The times within which the employer must implement the income-withholding order and forward the child support payment. (1995, c. 538, s. 7(c); 1997-433, s. 10.8.)

OFFICIAL COMMENT

Major employers and national payroll associations urged the National Conference of Commissioners on Uniform State Laws to supply more detail regarding the rights and duties of an employer on receipt of an income-withholding order from another State. The Conference obliged with amendments to UIFSA that set forth a series of steps for the employer to track.

The employer's first step is to notify the employee of receipt of the out-of-state withholding order. If the employee disputes the validity of the withholding order, it is the employee's responsibility to take appropriate defensive measures to contest the withholding. At this point neither an initiating nor a responding tribunal is directly involved. The withholding order may have been forwarded by the obligee, the obligee's attorney, or the out-of-state IV-D agency. In fact, there is no prohibition against anyone sending a valid copy of an income-withholding order, even a stranger to the litigation, such as the child's grandparent. Subsection (a) does not specify the method for sending this relatively informal notice for direct income withholding, but rather takes a permissive view of communication notice on the assumption that an obligor will act to prevent a wrongful invasion of income not owed as current child support or arrears.

Subsection (b) directs an employer of the enacting State to recognize a withholding order of a sister State, subject to the employee's right to contest the validity of the order or its enforcement. Prior to the promulgation of UIFSA, agencies in several States adopted a procedure of sending direct withholding requests to out-of-state employers. A contemporaneous study by the federal General Accounting Office reported that employers in a second State routinely recognized withholding orders of sister States despite an apparent lack of statutory authority to do so. UIFSA marked the first official sanction of this practice. Subsection (b) does not define "regular on its face," but the term should be liberally construed, see *U.S. v. Morton*, 467 U.S. 822 (1984) ("legal process regular on its face"). The rules governing intrastate procedure and defenses for withholding orders will apply to interstate orders. Thus, subsection (a) makes clear that employers who refuse to recognize out-of-state withholding orders will be subjected to whatever remedies are otherwise available under state law.

Subsection (c) is the answer to employers' complaints that insufficient direction for action was given by the original UIFSA. Formerly the employer was merely told to "distribute the funds as directed in the withholding order." This section clarifies the terms of the out-of-state order with which the employer must strictly comply, and those terms that are subject to compliance with local law. As a general principle, an employer is directed to comply with the specific terms contained in the order, but there are exceptions. Moreover, many income-withholding orders currently do not provide the detail necessary for the employer to comply with each and every directive. Fortunately, when the long-anticipated federal forms are finally promulgated, more uniformity in the text of child support orders will eventually occur. To the extent that an order is silent, the employer is not required to respond to unstated demands of the issuing State. Formerly, employers often were so concerned about ambiguous or incomplete orders that they telephoned child support enforcement agencies in other States to attempt to understand and comply with unstated terms. Employers should not be expected to become investigators or shoulder the responsibility of learning the law of 50 States.

Subsection (c)(1) directs that the amount and duration of periodic payments of current child support must be stated in a sum certain in order to elicit compliance. The duration of the support obligation is fixed by the controlling order and should be stated in the withholding order so that the employer is informed of the date on which the withholding is anticipated to terminate. The "sum certain" requirement is crucial to facilitating the employer's compliance. An order for a "percentage of the obligor's net income," for example, does not satisfy this requirement. A State that typically issues its orders as a percentage of income is not entitled to compliance by an employer receiving an interstate income-withholding order by an employer. Such a State should revisit the issue and provide an order for a sum certain if the procedures set forth in this article are to be employed.

Subsection (c)(2) states the obvious: Necessary information must be clearly stated. For example, the destination of the payments must correspond to the destination originally designated or subsequently authorized by the issuing tribunal.

Subsection (c)(3) provides that medical support for the child must be stated either by a periodic cash payment or, alternatively, by an order directing the obligor to provide health insurance coverage from his employment. In the absence of an order for payment of a sum certain, an order for medical support as child support requires the employer to enroll the obligor's child for coverage if medical insurance is available through the obligor's employment. Failure to enroll the child should elicit, at the least, registration of the order for enforcement in the responding State, to be implemented by an order of a tribunal directing the employer to comply. Because the employer is so directed by the medical support order, enrollment of the child in the health care plan at the employee-obligor's expense is not dependent on the obligor's consent, any more than withholding a sum certain from the obligor's wages is subject to a veto. It is up to the obligor to assert any defense to prevent the employer from abiding by the medical support order.

Subsection (c)(4) identifies certain costs and fees incurred in conjunction with the support enforcement that may be added to the withholding order.

Subsection (c)(5) requires that the amount of periodic payments for arrears and interest on arrears also must be stated as a sum certain. If the one-order system is to function properly, the issuing State ultimately must be responsible to account for payments and maintain the record of arrears and interest rate on arrears. Full compliance with the support order will only be achieved when the issuing State determines that the obligation no longer exists.

Subsection (d) identifies those narrow provisions in which the law of the employee's work State, rather than the law of the issuing State, should apply. A large employer will almost certainly have a number of employees subject to income-withholding orders. From the employer's perspective, the procedural requirements for compliance should be uniform for all of those employees. Certain issues should be matters for the law of the employee's work State, such as the employer's fee for processing, the maximum amount to be withheld, and the time in which to comply. The latter necessarily includes the frequency with which income withholding must occur. This is also consistent with regard to the tax consideration imposed by choice of law considerations. The only element of the list of local law concerns identified in subsection (d) which stirred any controversy whatsoever was the fact that the maximum amount permitted to be withheld is to be subject to the law of the employee's work State. Demands of equal treatment for all citizens of the responding State and the practical concern for uniform computer programming, however, mandate this solution.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, rewrote this section.

§ 52C-5-503. (Expires June 30, 1998) Compliance with multiple income-withholding orders.

If an obligor's employer receives multiple income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the multiple orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating

§ 52C-5-503 has a delayed expiration date. See notes.

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income withheld for multiple child support obligees. (1997-433, s. 10.8.)

OFFICIAL COMMENT

Consistent with the Act's general problem-solving approach, the employer is directed to deal with multiple income orders for multiple families in a manner consistent with local law.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

§ 52C-5-504. (Expires June 30, 1998) Immunity from civil liability.

An employer who complies with an income-withholding order issued in another state in accordance with this Article is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income. (1997-433, s. 10.8.)

OFFICIAL COMMENT

Because employer cooperation is a key element in interstate child support enforcement, it is sound policy to state explicitly that an employer who complies with the income-withholding order from another State is immune from civil liability.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

§ 52C-5-505. (Expires June 30, 1998) Penalties for noncompliance.

An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this State. (1997-433, s. 10.8.)

OFFICIAL COMMENT

Only an employer who willfully fails to comply with an interstate order should be subject to enforcement procedures. Local law is the appropriate source for the applicable sanctions.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

§ 52C-5-506. (Expires June 30, 1998) Contest by obligor.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this State in the same manner as if the order had been issued by a tribunal of this State. G.S. 52C-6-604 applies to the contest.

(b) The obligor shall give notice of the contest to:
(1) A support enforcement agency providing services to the obligee;
(2) Each employer that has directly received an income-withholding order; and
(3) The person or agency designated to receive payments in the income-withholding order if no person or agency is designated, to the obligee. (1997-433, s. 10.8.)

OFFICIAL COMMENT

This section incorporates the law regarding defenses an alleged obligor may raise to an intrastate withholding order into the interstate context. Generally, States have accepted the IV-D requirement that the only viable defense is a "mistake of fact." 42 U.S.C. § 666(b)(4)(A). This apparently includes "errors in the amount of current support owed, errors in the amount of accrued arrearage or mistaken identity of the alleged obligor" while excluding "other grounds, such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation." H.R. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983). The latter claims must be pursued in a separate legal action in the State having continuing, exclusive jurisdiction over the support order, not in a UIFSA proceeding.

After the employer receives a withholding order from another State, the first step is to notify the employee that income withholding for child support will begin within the time frame specified by state law, just as it would if the withholding order is received from a tribunal of the employer's State. It is the responsibility of the employee to take whatever protective measures are necessary to prevent the withholding if the employee asserts a defense.

This procedure is based on the assumption that defenses to income withholding for child support are few and far between. Experience has shown that only in a relatively few cases does an employee-obligor have a defense, *i.e.*, the child has died, another contingency ending the support has occurred, the order has been superseded, or there is a case of mistaken identity and the employee is not the obligor. An employee's complaint that "The child support is too high" must be ignored. The employee's simplest, most efficient, cost-effective method to assert a defense is probably to register the withholding order with a local tribunal and seek protection from that tribunal pending resolution of the contest. This may be accomplished through the obligor's employment of private counsel or by a request for services made to the child support enforcement agency of the responding State. In the absence of expeditious action by the employee to assert a defense and contest the request, however, the employer must begin income withholding in a timely fashion.

In contrast to the multiple-order system of RURESA, another issue the employee may raise is that the withholding order received by the employer is not based on the controlling child support order issued by the tribunal with continuing, exclusive jurisdiction, see Section 207, *supra*. Such a claim does not constitute a defense to the obligation of child support, but does put at issue the identity of the order to which the employer must respond. Clearly the employer is in no position to make such a decision. When multiple orders involve the same obligor and child, as a practical matter resort to a responding tribunal to resolve a dispute over apportionment almost certainly is necessary.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

§ 52C-5-507. (Expires June 30, 1998) Administrative enforcement of orders.

(a) A party seeking to enforce a support order or an income-withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a support enforcement agency of this State.

(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this State to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to this Chapter. (1997-433, s. 10.8.)

OFFICIAL COMMENT

This section authorizes summary enforcement of an interstate child support order through the administrative means available for intrastate orders. Under subsection (a), an interested party in another State, which necessarily may include a private attorney or a support enforcement agency, may forward a support order or income-withholding order to a support enforcement agency of the responding State. The term "responding State" in this context does not contemplate resort to a tribunal as an initial step.

Subsection (b) directs the support enforcement agency in the responding State to employ that State's regular administrative procedures to process an out-of-state order. Thus, a local employer accustomed to dealing with the local agency need not change its procedure to comply with an out-of-state order. Similarly, the administrative agency is authorized to apply its ordinary rules equally to both intrastate and interstate orders. For example, if the administrative hearing procedure must be exhausted for an intrastate order before a contesting party may seek relief in a tribunal, the same rule applies to an interstate order received for administrative enforcement. Thereafter, the order may be registered with a tribunal for enforcement if that is the next step for an intrastate order, see Sections 601-608, *infra*.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

Article 6.

Enforcement and Modification of Support Order After Registration.

Part 1. Registration and Enforcement of Support Order.

§ 52C-6-601. (Effective until June 30, 1998) Registration of order for enforcement.

A support order or an income-withholding order issued by a tribunal of another state may be registered in this State for enforcement. (1995, c. 538, s. 7(c); 1997-433, s. 10.9.)

OFFICIAL COMMENT

Sections 601 through 604 greatly expand the procedure for the registration of interstate support orders available under RURESA §§ 35-40. The common practice under RURESA was to initiate a new suit for the establishment of a support order, even though there was an existing order for child support. That practice is specifically rejected by UIFSA. The fact that RURESA permitted (really encouraged) initiation of a new suit under those circumstances led to the multiple support order system that UIFSA is designed to eliminate.

Under the one-order system of UIFSA, only one existing order is to be enforced prospectively (if more than one child support order exists, refer to Section 207 for resolution of the conflict). Registration of that order in the responding State is the first step to enforcement by a tribunal of that State. Rather than being an optional procedure, as was the case under RURESA, registration for enforcement under UIFSA is the primary method for interstate enforcement of child support. If the prior support order has been validly issued by a tribunal with continuing, exclusive jurisdiction, see Section 205, only that order is to be prospectively enforced against the obligor in the absence of narrow, strictly-defined fact situations in which an existing order may be modified. *See* Sections 609 through 612. Until that order is modified, however, it is fully enforceable in the responding State.

Registration should be employed if the purpose is enforcement. Although registration not accompanied by a request for affirmative relief is not prohibited, the Act does not contemplate registration as serving a purpose in itself.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. —

Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted "of" for "or" in the catchline.

CASE NOTES

German Divorce Decree. — German divorce decree and settlement agreement were properly registered under former § 52A-26. Lang v. Lang, 125 N.C. App. 573, 481 S.E.2d 380 (1997).

Record clearly showed that German authorities considered parties' settlement agreement to be an order of support where there was a letter from the German Federal Prosecutor asking the North Carolina Attorney General to take measures for the recovery of arrearage. Lang v. Lang, 125 N.C. App. 573, 481 S.E.2d 380 (1997).

§ 52C-6-602. Procedure to register order for enforcement.

(a) A support order or income-withholding order of another state may be registered in this State by sending the following documents and information to the tribunal for the county in which the obligor resides in this State:

(1) A letter of transmittal to the tribunal requesting registration and enforcement;

(2) Two copies, including one certified copy, of all orders to be registered, including any modification of an order;

(3) A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) The name of the obligor and, if known:
  a. The obligor's address and social security number;
  b. The name and address of the obligor's employer and another other source of income of the obligor; and
  c. A description and the location of property of the obligor in this State not exempt from execution; and

(5) The name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

(b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as a foreign order, together with one copy of the documents and information, regardless of their form.

(c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this State may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought. (1995, c. 538, s. 7(c); 1997-456, s. 27.)

OFFICIAL COMMENT

This section outlines the mechanics for registration of an interstate order. Subsection (c) warns that if a particular enforcement remedy must be specifically sought under local law, the same rule of pleading is applicable in an interstate case. The authorization of a later filing to comply with local law contemplates that interstate pleadings may be liberally amended to conform to local practice.

Editor's Note. — Subdivisions (4)(i), (4)(ii), and (4)(iii) of this section were renumbered as subdivisions (4)a., (4)b., and (4)c., respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 52C-6-603. Effect of registration for enforcement.

OFFICIAL COMMENT

Subsection (a) is derived from RURESA § 39(a), which stated that "filing constitutes registration." Although the registration procedure under UIFSA is nearly identical to that of RURESA, the underlying intent of registration is radically different. Under RURESA, once an order of State A was registered in State B, it became an order of the latter. Under UIFSA, the order continues to be a State A order, which is to be enforced by a State B tribunal. State B's rules of evidence and procedure apply to hearings, except as local law is supplemented or specifically superseded by the Act. The order itself remains a State A order.

Subsection (b) is derived from RURESA § 40(a). RURESA specifically subjected a registered order to "proceedings for reopening, vacating, or staying as a support order of this State"; these procedures are not authorized under UIFSA. An interstate support order is to be enforced and satisfied in the same manner as if it had been issued by a tribunal of the registering State, although it remains an order of the issuing State. Conceptually, the responding State is enforcing the order of another State, not its own order.

Subsection (c) mandates enforcement of the registered order. *See* Sections 606 through 608. This is at sharp variance with the common interpretation of RURESA § 40, which stated that "the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State." This language was generally construed as converting the foreign order into an order of the registering State. Once the registering court concluded that it was enforcing its own order, the next logical step was to modify the order as the court deemed appropriate. This rationale resulted in yet another order in the multiple-order system. UIFSA mandates an end to this process, except as modification is authorized in this article. *See* Sections 609 through 612.

Ultimately, under UIFSA there will be only one order in existence at any one time. That order is enforceable in a responding State irrespective of whether such an order may be modified. In most instances, the support order will be subject to the continuing, exclusive jurisdiction of the issuing State. But sometimes the issuing State will have lost its authority to modify the order because neither the child nor the parties continue to reside in the issuing State. Nonetheless, the order may be registered and is fully enforceable in a responding State until the potential for modification actually occurs in accordance with the strict terms for such an action. *See* Sections 609-612.

§ 52C-6-604. Choice of law.

OFFICIAL COMMENT

This section identifies situations in which local law is inapplicable. The basic principle of the Act is that throughout the process the controlling order remains the order of the issuing State, and that responding States only assist in the enforcement of that order. Absent a loss of continuing, exclusive jurisdiction and a subsequent modification of the order, the order never becomes an "order of the responding State." Ultimate responsibility for enforcement and final resolution of the obligor's compliance with all aspects of the support order belongs to the issuing State. Thus, calculation of whether the obligor has fully complied with the payment of current support, arrears, and interest on arrears, is the duty of the issuing State. For example, under subsection (a) the responding State must recognize and enforce an order of the issuing State for the support of a child until age 21, notwithstanding the fact that the duty of support of a child ends at age 18 under the law of the responding State. *See Gonzalez-Goengaga v. Gonzalez*, 426 So.2d 1106 (Fla. App. 1983); *Taylor v. Taylor*, 122 Cal. App. 3d 209, 175 Cal. Rptr. 716 (1981). Similarly, the law of the issuing State governs whether a payment made for the benefit of a child, such as a Social Security benefit for a child of a disabled obligor, should be credited against the obligor's child support obligation.

Subsection (b) contains another choice of law provision that may diverge from local law. In situations in which the statutes of limitation differ from State to State, the statute with the longer term is to be applied. In interstate cases, arrearages often will have accumulated over a considerable period of time before enforcement is perfected. The obligor should not gain an undue benefit from the choice of residence if the forum State has a short statute of limitations for arrearages.

Part 2. Contest of Validity of Enforcement.

§ 52C-6-605. (Effective until June 30, 1998) Notice of registration of order.

(a) When a support order or income-withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

(1) That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this State;

(2) That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice;

(3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrears and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) Of the amount of any alleged arrears.

(c) Upon registration of an income-withholding order for enforcement, the registering tribunal shall notify the obligor's employer pursuant to the income-withholding provisions of Chapter 50 or Chapter 110 of the General Statutes, as applicable. (1995, c. 538, s. 7(c); 1997-433, s. 10.10.)

OFFICIAL COMMENT

Sections 605-608 provide the procedure for the nonregistering party to contest registration of an order, either because the order is allegedly invalid, superseded, or no longer in effect, or because the enforcement remedy being sought is opposed by the nonregistering party.

This section directs that the nonregistering party be fully informed of the effect of registration. After such notice is given, absent a successful contest by the nonregistering party, the order will be confirmed and future contest will be precluded.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305. The same considerations apply to the deletion of the additional methods of notice originally prescribed in this section.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, deleted the second sentence of subsection (a), which read "Notice must be given by first-class, certified, or registered mail or by any means of personal service authorized by the law of this State"; and deleted "the date of mailing or personal service of the" preceding "notice" in subdivision (b)(2).

§ 52C-6-606. (Effective until June 30, 1998) Procedure to contest validity or enforcement of registered order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in this State shall request a hearing within 20 days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrears pursuant to G.S. 52C-6-607.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing. (1995, c. 538, s. 7(c); 1997-433, s. 10.11.)

OFFICIAL COMMENT

Subsection (a) is derived in part from RURESA § 40(b), under which the "obligor" was directed to contest the registration of a foreign order within a short period of time. This procedure is continued, but the terminology is changed to "nonregistering party" because either the obligor or the obligee may seek to register a foreign support order.

Moreover, subsection (a) is philosophically very different from RURESA § 40, which directed that a registered order "shall be treated in the same manner as a support order issued by a court of this state." A contest of the fundamental provisions of the registered order is not permitted in the responding State. The nonregistering party must return to the issuing State to prosecute such a contest (obviously only as the law of that State permits). The procedure adopted here is akin to the prohibition found in Section 315 against asserting a nonparentage defense in a UIFSA proceeding. In short, raising a collateral issue in a UIFSA proceeding is prohibited, but no attempt is made to preclude the issue from being litigated in another, more appropriate forum if otherwise allowed by that forum.

On the other hand, the respondent may assert defenses such as "payment" or "the obligation has terminated" to allegations of past noncompliance with the registered order. Similarly, a constitutionally-based attack may always be asserted, *i.e.*, an alleged lack of personal jurisdiction over a party by the issuing tribunal. There is no defense, however, to the registration of a valid foreign support order.

Subsection (b) precludes an untimely contest of a registered support order. As noted above, the nonregistering party is free to seek redress in the issuing State from the tribunal with continuing, exclusive jurisdiction over the support order.

Subsection (c) directs that a hearing be scheduled when the nonregistering party contests some aspect of the registration. At present, federal regulations govern the allowable time frames for contesting income withholding in IV-D cases. *See* 42 U.S.C. § 666(b). Additional, codification of the procedure process is unwise.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305. The same considerations apply to the deletion of the additional methods of notice originally identified in this section.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Effect of Amendments. — The 1997

amendment, effective October 1, 1997, deleted "the date of mailing or personal service of" preceding "notice of the registration" in subsection (a); and deleted "by first-class mail" following "parties" in subsection (c).

§ 52C-6-607. Contest of registration or enforcement.

OFFICIAL COMMENT

Subsection (a) places the burden on the nonregistering party to assert narrowly defined defenses to registration of a support order.

If the obligor is liable for current support, under subsection (b) the tribunal must enter an order to enforce that obligation. Proof of arrearages must result in enforcement; under the Bradley Amendment, 42 U.S.C. § 666(a)(10), all States are required to treat child support payments as final judgments as they come due (or lose federal funding). Therefore, such arrearages are not subject to retroactive modification.

§ 52C-6-608. Confirmed order.

OFFICIAL COMMENT

The policy determination that a foreign support order may need to be confirmed by the forum tribunal is derived from RURESA § 40, which incidentally did not explain the details of the confirmation procedure. Under UIFSA, confirmation of an order may be the result of operation of law because of a failure to contest or an unsuccessful contest after a hearing. Either method precludes raising any issue that could have been asserted in a hearing. Confirmation of a foreign support order validates both the terms of the order and the asserted arrearages. *See Chapman v. Chapman*, 205 Cal. App. 3d 253, 252 Cal. Rptr. 359 (1988).

Part 3. Registration and Modification of Child Support Order.

§ 52C-6-609. Procedure to register child support order of another state for modification.

OFFICIAL COMMENT

Sections 609 through 614 deal with situations in which it is permissible for a registering State to modify the existing child support order of another State. A petitioner wishing to register a support order of another State for purposes of modification must conform to the general requirements for pleadings in Section 311 (Pleadings and Accompanying Documents), and follow the procedure for registration set forth in Section 602 (Procedure To Register Order for Enforcement). If the tribunal has the requisite jurisdiction over the parties as established in Section 611, modification may be sought in conjunction with registration and enforcement, or at a later date after the order has been registered, confirmed, and enforced.

§ 52C-6-610. Effect of registration for modification.

OFFICIAL COMMENT

An order registered for purposes of modification may be enforced in the same manner as an order registered for purposes of enforcement. But, the power of the forum tribunal to modify a child support order of another tribunal is limited by the specific factual preconditions set forth in Section 611.

§ 52C-6-611. (Effective until June 30, 1998) Modification of child support order of another state.

(a) After a child support order issued in another state has been registered in this State, the responding tribunal of this State may modify that order only if G.S. 52C-6-613 does not apply and after notice and hearing it finds that:

(1) The following requirements are met:
  a. The child, the individual obligee, and the obligor do not reside in the issuing state;
  b. A petitioner who is a nonresident of this State seeks modification; and
  c. The respondent is subject to the personal jurisdiction of the tribunal of this State; or

(2) The child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this State and all of the parties who are individuals have filed a written consent in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this act, the consent otherwise required of an individual residing in this State is not required for the tribunal to assume jurisdiction to modify the child support order.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this State, and the order may be enforced and satisfied in the same manner.

(c) A tribunal of this State may not modify any aspect of a child support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be so recognized under G.S. 52C-2-207 establishes the aspects of the support order which are nonmodifiable.

(d) On issuance of an order modifying a child support order issued in another state, a tribunal of this State becomes the tribunal of continuing, exclusive jurisdiction.

(e) Repealed by Session Laws 1997-443, s. 10.12, effective October 1, 1997. (1995, c. 538, s. 7(c); 1997-433, s. 10.12; 1997-456, s. 27.)

OFFICIAL COMMENT

As long as the issuing State retains its continuing, exclusive jurisdiction over its child support order, a registering sister State is precluded from modifying that order. This is a very significant departure from the multiple-order, multiple-modification system of RURESA. However, if the issuing State no longer has a sufficient interest in the modification of its order under the factual circumstances described in this section, after registration the responding State may assume the power to modify. Note that under UIFSA a responding State does not have authority to modify a spousal support order; modification of a spousal support order is restricted to the original issuing tribunal. *See* Sections 205(f) and 206(c), *supra*.

Under the procedure established by RURESA, after a support order was registered for the purpose of enforcement it was treated as if it had originally been issued by the registering tribunal. Most States interpreted the RURESA registration provisions as also authorizing prospective modification of the registered order, see, *i.e.*, *Lagerwey v. Lagerwey*, 681 P.2d 309 (Alaska 1984); *In re Marriage of Aron*, 224 Cal. App. 3d 1086 (1990); *MacFadden v. Martini*, 119 Misc. 2d 94, 463 N.Y.S.2d 674 (1983); *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977). In sum, by its terms RURESA contemplated the existence of multiple support orders, none of which was directly related to any of the others. Although the issuing tribunal under RURESA retained a version of continuing, exclusive jurisdiction to modify its own order, that power was not exclusive. Tribunals in other States often assumed jurisdiction to enter new orders or to modify an out-of-state support order.

Under UIFSA, registration is subdivided into distinct categories: registration for enforcement, for modification, or both. UIFSA is based on recognizing the truism that when a foreign support order is registered for enforcement, the rights of the parties affected have been previously litigated. Because the obligor already has had a day before an appropriate tribunal, an enforcement remedy may be summarily invoked. On the other hand, modification of an existing order presupposes a change in the rights of the parties. In fact, even under RURESA more elaborate procedures were required by most States prior to the issuance of a modified order. The requirements for modification of a child support order are much more explicit and restrictive under UIFSA.

Under UIFSA a tribunal may modify an existing child support order of another State only if certain quite limited conditions are met. First, the tribunal must have all the prerequisites for the exercise of personal jurisdiction required for rendition of an original support order. Second, one of the restricted fact situations described in subsection (a) must be present. This section, which is a counterpart to Section 205(b) (Continuing, Exclusive Jurisdiction), establishes the conditions under which the continuing, exclusive jurisdiction of the issuing tribunal is released. The degree to which new standards are established is illustrated by comparing UIFSA to the Uniform Child Custody Jurisdiction Act. Sections 12-14 of the UCCJA provide general principles for the judicial determination of an appropriate fact situation for subsequent modification of an existing custody order by another court. In contrast, UIFSA establishes a set of "bright line" rules which must be met before a tribunal may modify an existing child support order. The intent is to eliminate multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act.

The UIFSA system begins with Section 205, which mandates that the continuing, exclusive jurisdiction of the issuing tribunal remains intact as long as one individual party or the child continues to reside in the issuing State, or unless the parties mutually agree to the contrary. This is also the standard for recognition of sister state custody orders under the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Once every individual party and the child leave the issuing State, the continuing, exclusive jurisdiction of the issuing tribunal to modify its order terminates, although its order remains in effect and enforceable until it is modified by another tribunal with authority to do so under the Act. If and when the order is modified by a tribunal of another State, the basic principle of UIFSA is further ratified. The order of the modifying tribunal becomes the operative "controlling order" and the modifying tribunal assumes continuing, exclusive jurisdiction over the only operative child support order.

Under subsection (a)(1), the individual parties affected by the initial order must have moved from the issuing State before a tribunal in a new forum may modify. In the overwhelming majority of cases, the party seeking modification must seek that relief in a new forum, almost invariably the State of residence of the other party. This rule applies to either obligor or obligee, depending on which of those parties seeks to modify. Proof of the fact that neither individual party nor the child continues to reside in the issuing State may be made directly in the forum State; no purpose would be served by requiring the petitioner to return to the original issuing State for a document to confirm the fact that none of the relevant persons still lives there.

The policies underlying the change affected by subsection (a)(1) contemplate that the issuing State has lost continuing, exclusive jurisdiction and that the obligee may seek modification in the obligor's State of residence, or that the obligor may seek a modification in the obligee's State of residence. This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party. For example, an obligor visiting the children at the residence of the obligee cannot be validly served with citation accompanied by a motion to modify the support order. Even though such personal service of the obligor in the obligee's home State is consistent with the jurisdictional requisites of *Burnham v. Superior Court*, 495 U.S. 604 (1990), the motion to modify does not fulfill the requirement of being brought by "a [petitioner] who is a nonresident of this State ...." In short, the obligee is required to register the existing order and seek modification of that order in a State which has personal jurisdiction over the obligor other than the State of the obligee's residence. Most typically this will be the State of residence of the obligor. Similarly, fairness requires that an obligee seeking to modify or modify and enforce the existing order in the State of residence of the obligor will not be subject to a cross-motion to modify custody or visitation merely because the issuing State has lost its continuing, exclusive jurisdiction over the support order. The obligor is required to make that motion in a State other than that of his or her residence; most likely, the obligee's State of residence.

The procedure put in place by UIFSA is in marked contrast to the actual system under RURESA. The multiple-order system provided virtually no incentive for an obligor to seek to reduce an unfair or unduly burdensome child support order. Rather, the obligor typically waited for an enforcement proceeding to be filed in his State of residence and then sought modification in a forum which presented him with the "hometown advantage." Two major arguments sustain the choice of venue made by the Act. First, "jurisdiction by ambush" will be avoided. That is, personal service on either the custodial or noncustodial party found within the state borders will not yield jurisdiction to modify. Thus, parents seeking to exercise rights of visitation, delivering or picking-up the child for such visitation, or engaging in unrelated business activity in the State, will not be involuntarily subjected to protracted litigation in an inconvenient forum. The chilling effect on the exercise of parental contact with the child that the possibility of such litigation might have is avoided. Second, disputes about whether the tribunal has jurisdiction will be eliminated; submission by the petitioner to the State of residence of the respondent alleviates this issue completely.

There are two exceptions to the rule of subsection (a)(1) requiring the petitioner to be a nonresident of the forum in which modification is sought. First, under subsection (a)(2) the parties may agree that a particular forum may serve to modify the order. Second, Section 613, *infra*, applies if all parties have left the original issuing State and now reside in the same new forum State.

Subsection (a)(2), which authorizes the parties to terminate the continuing, exclusive jurisdiction of the issuing State by agreement, is based on several implicit assumptions. First, the subsection applies even if the issuing tribunal has continuing, exclusive jurisdiction because one of the parties or the child continues to reside in that State. Subsection (a)(2) also is applicable if the individual parties and the child no longer reside in the issuing State, but agree to submit the modification issue to a tribunal in the petitioner's State of residence. Also implicit in a shift of jurisdiction over the child support order is that the agreed-upon tribunal must have subject matter jurisdiction and personal jurisdiction over at least one of the parties or the child, and that the other party submits to the personal jurisdiction of that forum. In short, UIFSA does not contemplate that absent parties can agree to confer jurisdiction on a tribunal without a nexus to the parties or the child. But if the other party agrees, either the obligor or the obligee may seek assertion of jurisdiction to modify by a tribunal of the State of residence of either party. In contrast to subsection (a)(1), the written consents of the individual parties to an agreement to submit modification of child support to a tribunal of another State must be filed with the issuing tribunal. The Act does not extend discretion to refuse to yield jurisdiction to the issuing tribunal. In sum, the section contemplates that mutual agreement of the parties to submit themselves to the continuing, exclusive jurisdiction of another tribunal is sufficient to accomplish that goal.

The 1996 amendments provide a different rule if the issuing State is a foreign nation that has not enacted UIFSA or a similar statute or procedure. The policies underlying provisions of UIFSA are wholly inapplicable to a jurisdiction which is unlikely to enact the Act or even a similar act. For example, suppose the foreign jurisdiction has a prohibition against modification unless the parties actually appear before the tribunal in person. Without the amendment, an obligor who moved to the United States could have successfully warded off an attempt to modify the child support obligation in his State of residence by asserting that the obligee or child continued to reside in the foreign nation, which therefore had continuing, exclusive jurisdiction under UIFSA. This despite the fact that the issuing nation does not recognize a continuing, exclusive jurisdiction concept, and will not modify its own child support order without the obligor being physically present. Merely by refusing to agree to a modification and refusing to travel to the issuing nation, the obligor would have been able to forestall modification indefinitely. If the child support order is that of a foreign nation, the UIFSA State of residence of the obligor may adjudicate whether modification of child support is appropriate under its internal law.

Modification of child support under subsections (a)(1) and (a)(2) is distinct from custody modification under the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A, which provides that the court of continuing, exclusive jurisdiction may "decline jurisdiction." Similar provisions are found in the UCCJA, § 14. In those statutes the methodology for the declination of jurisdiction is not spelled out, but rather is left to the discretion of possibly competing courts for case-by-case determination. The privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA. Once an initial child support order is established, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article.

Subsection (b) states that if the forum has modification jurisdiction because the issuing State has lost continuing, exclusive jurisdiction, the proceedings will generally follow local law with regard to modification of child support orders. However, subsection (c) prevents the modification of any final, nonmodifiable aspect of the original order. For example, if child support was ordered through age 21 in accordance with the law of the issuing State and the law of the forum State ends the support obligation at 18, modification by the forum tribunal may not affect the duration of the support order to age 21. The 1996 amendment clarifies that when multiple orders have been issued prior to the effective date of UIFSA, there will almost certainly be nonmodifiable aspects at variance from the two or more tribunals that have acted in the past. The amendment clarifies that it is the controlling order's nonmodifiable aspects that prospectively determine those issues throughout the minority of the child.

Subsection (d) provides that upon modification the new order becomes the one order to be recognized by all UIFSA States, and the issuing tribunal acquires continuing, exclusive jurisdiction.

For this section as in effect June 30, 1998, see the main pamphlet.

Editor's Note. — Session Laws 1997-433, s. 11.3, provides that the act expires June 30, 1998.

Subdivisions (a)(1)(i), (a)(1)(ii), (a)(1)(iii) of this section were renumbered as subdivisions (a)(1)a., (a)(1)b., and (a)(1)c., respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, rewrote this section.

§ 52C-6-612. Recognition of order modified in another state.

OFFICIAL COMMENT

Independent support orders relating to the same parties, a hallmark of RURESA, are replaced in UIFSA by deference to the support order of a sister State. This applies not just to the original order, but also to a modified child support order issued by a second State under the standards established by Section 611 (Modification of Child Support Order of Another State). For the Act to function properly, the original issuing State must recognize and defer to such a modified order, and must regard its prior order as prospectively inoperative. Because the modifying tribunal lacks the authority to direct the original issuing State to release its continuing, exclusive jurisdiction, each State must recognize this effect by enacting UIFSA.

Power is retained over post-modification by the original issuing tribunal for remedial actions directly connected to its now-modified order. A tribunal may enforce its subsequently modified order for violations of that order which occurred before the modification. Further, aspects of the original order that have become final or are not modifiable may be prospectively enforced by the issuing tribunal. For example, a contractual obligation to provide a college education trust fund for a child may be enforced under the law of the issuing State irrespective of the law of the modifying State.

§ 52C-6-613. (Expires June 30, 1998) Jurisdiction to modify child support order of another state when individual parties reside in this State.

(a) If all of the parties who are individuals reside in this State and the child does not reside in the issuing state, a tribunal of this State has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order.

(b) A tribunal of this State exercising jurisdiction under this section shall apply the provisions of Articles 1 and 2 of this Chapter, this Article, and the procedural and substantive law of this State to the proceeding for enforcement or modification. Articles 3, 4, 5, 7, and 8 of this Chapter do not apply. (1997-433, s. 10.13.)

OFFICIAL COMMENT

The Comment to Section 611(e) in the 1992 version of UIFSA contains the following statement:

"Finally, note that if the parties have left the issuing state and now reside in the same state, this section is not applicable. Such a fact situation does not present an interstate matter and UIFSA does not apply. Rather, the issuing state has lost its continuing, exclusive jurisdiction and the forum state, as the residence of the parties, should apply local law without regard to the interstate Act."

The intent of the Comment was to state what seemed at the time to the Drafting Committee to be obvious; an action between two citizens of the same State is not a matter for interstate concern or application. A significant number of knowledgeable commentators, however, found the statement in the Comment to be wholly inadequate. After all, the commentary is not substantive law, but rather merely expresses an interpretive opinion of the drafters of the Act. On reflection, the Drafting Committee decided that the critics were correct; the Act should deal explicitly with the possibility that the parties and the child no longer reside in the issuing State and that the individual parties have moved to the same new State. After all, there is an interstate aspect when one State purports to modify the child support order of another State. Moreover, a literal reading of the Act could yield a construction that the issuing State has lost its continuing, exclusive jurisdiction to modify, but no State is permitted under UIFSA to take its place to do so.

This section is designed to make it clear that when the issuing State no longer has continuing, exclusive jurisdiction and the obligor and obligee reside in the same State, a tribunal of that State has jurisdiction to modify the child support order and assume continuing, exclusive jurisdiction. Although the individual parties must reside in the forum State, there is no requirement that the child must also reside in the forum State (although the child must have moved from the issuing State).

Finally, because modification of the child support order when all parties reside in the forum is essentially an intrastate matter, subsection (b) withdraws authority to apply most of the substantive and procedural provisions of UIFSA, *i.e.*, those found in the Act other than in Articles 1, 2, and 6. Note, however, that the provision in Section 611(c) forbidding modification of nonmodifiable aspects of the controlling order applies. For example, the duration of the support obligation remains fixed despite the subsequent residence of all parties in a new State with a different duration of child support.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

§ 52C-6-614. (Expires June 30, 1998) Notice to issuing tribunal of modification.

Within 30 days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction. (1997-433, s. 10.13.)

OFFICIAL COMMENT

This section, derived from former Section 611(e) of the 1993 version of the Act, is made a stand-alone provision to clarify the organization of the Act. Section 614 states a crucial proposition; the prevailing party must inform the original issuing tribunal that it has lost continuing, exclusive jurisdiction over the child support order. Thereafter, the original tribunal may not modify, or review and adjust, the amount of child support. Notice to the issuing tribunal and other affected tribunals that the former controlling order has been modified is crucial to avoid the confusion and chaos of the multiple-order system UIFSA is designed to replace.

Additionally, the 1996 amendment grants the tribunal the authority to impose sanctions on a party who fails to comply with the requirement to give notice of a modification to all interested tribunals. As originally enacted, this provision could have been regarded as hortatory because no penalty was authorized for failure to comply with the directive of the statute. The 1996 amendment not only provides discretion for sanctions as appropriate, but also states that failure to notify of a modification does not affect the validity of the modified order.

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997, and provides that the act expires June 30, 1998.

ARTICLE 7.

Determination of Parentage.

§ 52C-7-701. Proceeding to determine parentage.

OFFICIAL COMMENT

This article authorizes a "pure" parentage action in the interstate context, *i.e.*, an action not joined with a claim for support. Either the mother or a man alleging to be the father of a child may bring such an action. More commonly, an action to determine parentage across state lines will also seek to establish a support order under the Act. *See* Section 401 ([Petition] to Establish Support Order).

An action to establish parentage under UIFSA is to be treated identically to such an action brought in the responding State.

ARTICLE 8.

Interstate Rendition.

§ 52C-8-801. Grounds for rendition.

OFFICIAL COMMENT

This section tracks RURESA § 5 (Interstate Rendition) with no substantive change. Virtually no controversy has been generated regarding this portion of RURESA. Arguably application of subsection (c) is problematic in situations in which the obligor neither was present in the demanding State at the time of the commission of the crime nor fled from the demanding State. The possibility that an individual may commit a crime in a State without ever being physically present there has elicited considerable discussion and some case law. *See* L. Brilmayer, "An Introduction to Jurisdiction in the American Federal System," 329-335 (1986) (discussing minimum contacts theory for criminal jurisdiction); Rotenberg, "Extraterritorial Legislative Jurisdiction and the State Criminal Law," 38 Tex. L. Rev. 763, 784-87 (1960) (due process requires that the behavior of the defendant must be predictably subject to State's criminal jurisdiction); *cf.* Ex parte Boetscher, 812 S.W.2d 600 (Tex. Crim. App. 1991) (Equal Protection Clause limits disparate treatment of nonresident defendants); *In re King*, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970), cert. denied 403 U.S. 931 (enhanced offense for nonresidents impacts constitutional right to travel).

§ 52C-8-802. Conditions of rendition.

OFFICIAL COMMENT

This section tracks RURESA § 6 (Conditions of Interstate Rendition) without significant change. Interstate rendition remains the last resort for support enforcement, in part because a governor may exercise considerable discretion in deciding whether to honor a demand for rendition of an obligor.

ARTICLE 9.

Miscellaneous Provisions.

§ 52C-9-901. Uniformity of application and construction.

OFFICIAL COMMENT

Renaming the Act reflects the dramatic departure from the structure of the earlier interstate reciprocal support acts, URESA and RURESA.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 1, 1997

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1997 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

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STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 1, 1997

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Michael F. Easley

Attorney General of North Carolina

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